88-950

96-88

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1989

NO._____

Supreme Court, U.S.
FILED
DEC 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

CAROLE L. PAGE,

Petitioner,

vs.

E. I. DU PONT DE NEMOURS
AND COMPANY,

Respondent.

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

Richard G. Dusenbury
Dusenbury & Snow, P.A.
Post Office Box 555
Florence, South Carolina 29503
(803) 669-6481

Counsel for Petitioner

December 6, 1988

110pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Decision of United States Court of Appeals, Fourth Circuit . . .	1
Order of United States District Court for South Carolina, Florence Division, Judge Clyde H. Hamilton	9
Verbatim Excerpts from Lower Court Records	84
Sexual Harassment and Sexually Hostile Environment	84
Stress and Constructive Discharge	91
Retaliation and Failure to Intervene Effectively	96

TABLE OF AUTHORITIES

CASES — Page

Christiansburg Garmet Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2nd, 648 (1978) 82

Glymph v. Spartanburg General Hosp., 783 F.2d 476, (4th Cir. 1986) 82

Henson v. City of Dundee, 682 F.2d 897 903-905 (11th Cir. 1982) 64

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 4,5,63,64,66,69,70,71

Marks v. Prattco, Inc., 607 F.2d 1153, (5th Cir. 1979) 73

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973) 72,74,75,77

McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) 69

Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L.Ed. 2d 49, 106 S.Ct. 2399 (1986) 4,61,62,65

Rabidue v. Osceola Refining Company, 805 F.2d 611, (6th Cir. 1986), cert. denied, 107 S.Ct. 1983 (1987) 64,66

Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985). . . 78,80,81

United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977) 60

STATUTES

Title VII of the Civil Rights Act of 1964 42 U.S.C. Sec. 2000e-2(a)(1) (1982) 2,61

Title VII of the Civil Rights Act 42 U.S.C. Sec. 2000e-3(a) (1982) . . . 3,77

Title VII of the Civil Rights Act 42 U.S.C. Sec. 2000e-5(f)(1) & 3 . . 59,83

Title VII of the Civil Rights Act 42 U.S.C. Sec. 2000e-5(e) 59,83

28 U.S.C. Sec. 1331 59

MISCELLANEOUS

EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R.Sec.1604.11 . . 62

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3754

CAROLE L. PAGE, Plaintiff-Appellant,

v.

E. I. DU PONT DE NEMOURS
AND COMPANY, Defendant-Appellee,

Appeal from the United States District Court for the District of South Carolina, at Florence. Clyde H. Hamilton, District Judge, (CA-86-1432)

Argued: June 6, 1988

Decided: September 7, 1988

Before RUSSELL, ERVIN AND CHAPMAN, Circuit Judges.

Richard Green Dusenbury (DUSENBURY & SNOW, P.A. on brief) for Appellant. Gardner G. Courson (William S. Myers, G. Daniel Ellzey, OGLETREE, DEAKINS, NASH, SMOAK AND STEWART on brief) for Appellee.

PER CURIAM:

The plaintiff-appellant, Carole L. Page, was an employee of the defendant-appellee, E. I. Du Pont DeNemours & Company, Inc., from March 23, 1981 until August 2, 1985. Page has sued Du Pont alleging that she was a victim of sex discrimination while an employee of Du Pont's Florence, S. C. plant. Page alleged below that Du Point violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec 2000e, et seq., in four ways: first, through discriminatory discharge based on Page's sex, in violation of section 703(a)(1);[1] second, through sexual harassment resulting from a sexually hostile work environment in violation of section 703(a)(1); third, through retaliatory discharge in response

---

[1] 42 U.S.C. Sec. 2000e-2(a)(1) (1982).

to Page's filing of a complaint of sexual harassment, in violation of section 704(a);[2] and fourth, through retaliatory discrimination in the form of a sexually hostile work environment, created or tolerated in retaliation for registering a complaint of sexual harassment, also in violation of section 704(a). Du Pont contended, on the other hand, that any hostility Page encountered at work was due not to her sex but to her abrasive personality and that she was ultimately discharged because of excessive absenteeism.

Following a bench trial the district court found against Page on all her causes of action and granted judgment in favor of Du Pont. Page's primary claim was sexual

---

[2] 42 U.S.C. Sec. 2000e-3(a) (1982)

harassment. She based such claim on a sexual advance by her fellow employee, Cecil Hooks, during work hours, and on sexually suggestive graffiti placed in the wall of the ladies' rest facilities in the area where she worked. She seeks to hold the employer responsible for these actions under the doctrine of respondeat superior. The circumstances under which such a claim can be successfully asserted against an employer were stated by us in Katz v. Dole, 709 F.2d 251, 251 (4th Cir. 1983), and later by the Supreme Court in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986)[3].

---

[3] Meritor involved an allegation of unwelcome sexual advances by the complaining employee's supervisor. In this case the offending party was a fellow employee and not Page's supervisor.

The requirements are that knowledge of the alleged incident of sexual impropriety be brought to the attention of the employer and that the employer take action to reprimand the offending employee and to take appropriate steps to prevent a recurrence of the impropriety. Katz, at 256. Turning first to the graffiti incident, Page never brought such incident to the employer's attention, nor is there any evidence the employer knew of the incident. This fact is sufficient to dismiss this claim. Page did, however, bring the improper sexual advances of her fellow employee to the attention of the employer, and the employer promptly investigated the incident, gave the offending employee a formal reprimand, duly recorded the incident on the offending employee's employment record, and warned him of discharge if there were any repitition of the offense. The

employer also called a meeting of the employees in Page's department and severely admonished them all against any improper sexual harassment toward female employees and particularly of Page. There were, according to Page herself, no sexual improprieties by the offending employee or any other male employee after these steps had been taken by the employer. The district judge found that the employer therefore had met its burden under Katz, and Meritor, supra, and dismissed this claim. His decision on this point, based on a careful and detailed review of the evidence, was amply supported by the record and was not clearly erroneous.

Page also alleges that her discharge was in retaliation for the filing of her sexual harassment charge. It was the employer's defense to this claim that Page was discharged not because of her filing of the charge but because of a record of absenteeism extending over several years,

finally culminating at the time of her discharge in 1985, when she had a record of 85.6% absences when she was scheduled to work. Her attendance record at that time had so deteriorated that her continued employment in the department was clearly intolerable. During all the preceding years the employer had made repeated unsuccessful efforts to assist Page in improving her attendance record and condoned her excessive absence until in 1985 when the absences became so excessive. The district court found that Page did not refute this evidence. The district judge accordingly found that Page's discharge was not retaliatory but was reasonably justified by Page's inexcusable attendance record at the time of her discharge. The employer's discharge for absenteeism was accordingly found not to be pretextual. The record amply supports this finding and sustains the dismissal of this cause of action.

The other claims of Page were related to two relatively trivial incidents. The district judge, however, considered these carefully, reviewed painstakingly the evidence, and found that they were without merit. Such findings are amply supported by the record and were not clearly erroneous. We accordingly affirm the judgment herein on the basis of the excellent opinion of the district judge.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

CAROLE L. PAGE,	)	CIVIL ACTION NO. 4:86-1432-15H
Plaintiff,	)	
-vs-	)	ORDER
E.I. DU PONT DE NEMOURS & COMPANY, INC.,	)	FILED SEP - 2, 1987
	)	ANN A. BIRCH, CLERK COLUMBIA, S. C.
Defendant.	)	
	)	ENTERED 9-4-87

Carole L. Page, plaintiff, brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e to 2000e-17, alleging that she was wrongfully discharged from her job at E. I. du Pont de Numours & Company (hereinafter "Du Pont") and that while she was employed there she was subjected to both unlawful retaliation and a sexually

hostile work environment.[1] The matter came on for trial before the court sitting without a jury on March 11, 12, 13, 16, 17, 18, 19, and 20, 1987.

After receiving the testimony, carefully considering the entire record, weighing the credibility of the witnesses, reviewing the exhibits, and studying the applicable law, this court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52, Federal Rules of Civil Procedure. The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

[1] At trial, plaintiff's attorney stated that plaintiff was asserting all three causes of action. (Transcript at 15-16). Although plaintiff may have abandoned her claim for wrongful discharge by not addressing it in her Proposed Revised Findings of Fact and Conclusions of Law, the court will address this cause of action, as well as the other two since the case was tried on all three causes of action.

FINDINGS OF FACT

1. Plaintiff, Carole L. Page, is a forty-four year old white female who resides in Lake View, South Carolina. (Transcript at 22).

2. Du Pont operates a plant in Florence, South Carolina, that manufactures Mylar and Cronar. Mylar and Cronar are polyester film products. (Defendant's Exhibit 1). At all relevant times, DuPont was an employer as defined by 42 U.S.C. Sec. 2000e.

3. Plaintiff was hired by Du Pont on March 23, 1981, and was its employee, as defined by 42 U.S.C. Sec. 2000e, until August 2, 1985. (Plaintiff's Exhibit 99).

4. After orientation, plaintiff began work in the Mylar casting area. (Transcript at 40).

5. On June 22, 1981, plaintiff was transferred to the Cronar area. (Plaintiff's Exhibit 99). After completing training, plaintiff was assigned to "D" shift in Cronar casting. By September,

1981, plaintiff had been upgraded from Class 2 to a Class 3 employee. (Transcript at 40; Plaintiff's Exhibit 99).

The Wheel Room Incident

6. In September, 1981, the Cronar production line at the Du Pont plant in Florence became operational. (Defendant's Exhibit 1).

7. During the start-up procedure, hot polymer was present in the wheel room. The temperature of the polymer was approximately 280 to 285 degrees Centigrade. In addition, the polymer could have gas trapped in it, which would cause it to spray. Therefore, anyone handling the polymer or in the vicinity of the polymer was required to wear protective clothing called a hot suit. (Transcript at 724, 1325).

8. The dangers of the wheel room were explained to plaintiff during her training. (Transcript at 724). During the start-up proecedure, several Du Pont

employees, including plaintiff, entered the wheel room without wearing protective clothing. James V. DeTitta, Jr.,[2] the supervisor of plaintiff's shift, removed all persons from the wheel room who were not wearing protective clothing. (Transcript at 727-728, 1326).

9. Plaintiff testified that DeTitta grabbed her on the elbow and physically removed her from the wheel room. (Transcript at 43-44). Plaintiff fruther testified that because she was the only person who was touched, she was sexually discriminated against as well as physically assaulted. (Transcript at 426). Plaintiff protested her treatment in the wheel room. (Transcript at 44, 428). Although DeTitta's actions were motivated entirely by concern for the unprotected

---

[2] Whenever clear and unambiguous reference is possible, Du Pont personnel are identified by only their surnames.

workers' safety, he nevertheless apologized to plaintiff for any touching that may have occurred, and plaintiff accepted his apology. (Transcript at 430, 724-725, 894). Plaintiff was offered a position on another shift, but turned down a transfer in order to remain in a car pool. (Transcript at 45). Although plaintiff believes that the entire chain of events that occurred during her employment at Du Pont was precipitated by the wheel room incident, she was satisfied with the settlement of this matter and with De Titta's apology. (Transcript at 429-430, 488).

10. Although plaintiff testified that her supervision was hostile and unresponsive to her needs following the wheel room incident, DeTitta, her shift supervisor, did not treat her any differently than he treated male employees. (Transcript at 46, 723, 725-726).

11. In January, 1982, plaintiff had her gall bladder removed and missed seven days of work. She was on a lifting restriction, or light duty, for four days after she returned to work. (Transcript at 50, 52; Defendant's Exhibit 9).

12. After plaintiff returned to work and was released from light duty, she was contacted by Carroll Enzor, her shift supervisor, concerning attendance.

(Transcript at 53, 729). According to Du Pont policy, employees are to be at work as scheduled whenever possible. (Transcript at 865, 947, 1319, 1590-1591; Defendant's Exhibit 1). Excessive absenteeism, whether for medical or other reasons, is a ground for termination of employment from Du Pont. (Transcript at 1590-1591; Defendant's Exhibit 1). A hardship, in the form of increased duties and responsibilities, is placed on the remaining employees when one employee is absent from work. (Transcript at 751-752, 805).

13. Following her gall bladder surgery, plaintiff began to make notes concerning events at Du Pont. (Transcript at 55). She noted "anything that [she] thought was worth noting." Id. Plaintiff made these notes in a notebook and carried

the notebook with her. (Transcript at 54-55, 753-754).

14. In March and April, 1982, plaintiff missed eleven full days and three part days of work due to illness. (Defendant's Exhibit 9). Du Pont policy requires employees to keep in contact with their supervision while they are out on disability. (Defendant's Exhibit 1). In general, plaintiff kept in touch with her supervision while she was out on disability. (Transcript at 730). In addition, plaintifff's supervisors called her at home to keep in touch with her and save her long distance telephone charges. (Transcript at 730). Male employees were also telephoned in this fashion. (Transcript at 730-731).

15. During 1982, plaintiff was contacted by her supervision concerning her attendance. These were normal contacts on attendance. (Transcript at 732, 743, 746). These contacts were made

to help plaintiff improve her attendance record, rather than to threaten or harass her. (Transcript at 746).

16. In August, 1982, plaintiff was evaluated at Duke University Hospital for chronic diarrhea. (Defendant's Exhibits 47, 48).

17. Following the evaluation, plaintiff and her doctors thought her diarrhea was cured, but it periodically recurred. (Plaintiff's Exhibits 9, 12).

18. Plaintiff missed additional days from work in September, 1982, due to illness. (Defendant's Exhibit 9).

19. On Friday, October 14, 1982, Bob Patterson, a production supervisor under whom plaintiff worked, talked with Harold Hatfield, a supervisor in the personnel department at Du Pont, concerning a possible leave of absence for plaintiff. (Transcript at 1318, 1320; Plaintiff's Exhibit 9). Bob Patterson thought that plaintiff was probably thinking of being

paid under Du Pont's disability wage plan rather than taking a leave of absence. (Transcript at 1320; Plaintiff's Exhibit 9).

20. The disability wage plan is a Du Point employee benefit plan that protects Du Pont employees against loss of income during periods of justified illness or injury through payment of regular wages during such periods. An employee must have one year of service with Du Pont to be eligible for payment under this plan. After plaintiff had been a Du Pont employee for one year, she was eligible to be paid under the disability wage plan. Plaintiff's illnesses were considered to be legitimate, and she was paid pursuant to the disability wage plan during her absences due to illness. (Transcript at 1320-1321, 1398, 1581, 1591; Defendant's Exhibit 1).

21. On October 20, 1982, Bob Patterson, Steve Love, plaintiff's area

supervisor, and Terry Baldwin, the personnel superintendent, had a meeting and talked about the options available to help improve plaintiff's health. (Transcript at 1322, 1587; Plaintiff's Exhibits 9, 12). The options considered ranged from continuing to pay plaintiff disability wages to terminating plaintiff for unsuitability for industrial type work. All three supervisors agreed that the Du Pont medical staff should be more involved in the handling of plaintiff's situation. (Transcript at 1322; Plaintiff's Exhibits 9, 12).

22. By October 21, 1982, Carroll Enzor had made several contacts with plaintiff concerning attendance. (Transcript at 729). On October 21, 1982, CarrollEnzor, following normal procedues, compiled a record of plaintiff's attendance during 1982, showing who plaintiff's doctors were, what plaintiff's illness

was, and what follow up treatment was planned. He sent this document to Bob Patterson, production supervisor. (Transcript at 729-730, 1318; Defendant's Exhibit 20).

23. Bob Patterson received Enzor's note outlining plaintiff's situation. (Defendant's Exhibit 20; Plaintiff's Exhibits 9, 12). Patterson's notes reflect that Dr. Early, the plant physician, had talked with plaintiff concerning her health problems and their treatment, and that plaintiff had been asked to provide Dr. Early with complete medical reports covering her diagnosis, prognosis, and recommendations. (Plaintiff's Exhibits 9, 12).

24. On October 25, 1982, plaintiff returned to Duke University Hospital for a checkup. (Defendant's Exhibit 9).

25. On October 26, 1982, plaintiff passed out while driving to work and ran her truck into a swamp. (Transcript at

1323; Defendant's Exhibit 64).

26. On November 16, 1982, plaintiff reported to Enzor, her shift supervisor, that she was feeling fine, had no problems, was not under the care of a doctor or a psychiatrist, but did have to return to Duke once a year for a checkup. Enzor wrote a memorandum memorializing this conversation and sent it on to Patterson. (Transcript at 731; Defendant's Exhibit 21).

27. On December 13, 1982, plaintiff was promoted to a Class 4 employee and was assigned to Cronar casting and stretch on "C" shift. (Transcript at 87; Plaintiff's Exhibit 99). However, it was later determined that plaintiff's promotion had been in error, due to a seniority mis-calculation, and therefore, on January 3, 1983, plaintiff was returned to Class 3 status and was transferred back to "D" shift. (Transcript at 88; Plaintiff's Exhibit 99).

28. While plaintiff was on "D" shift in late January, 1983, her mother died. (Transcript at 88). Robert Mack, Bob Patterson, Raleigh Dutton, and the assistant plant manager attended plaintiff's mother's funeral. (Transcript at 91). Plaintiff asked Robert Mack, her shift foreman, for two days' vacation, which he allowed. (Transcript at 91, 897). Plaintiff subsequently contacted Robert Mack and asked for two more days of vacation. Id. Upon learning that plaintiff was sick, however, Mack refused to grant her request for vacation time. He did, however, grant her two additional days of leave with disability pay due to her illness. (Transcript at 897-898; Plaintiff's Exhibit 20; Defendant's Exhibit 57).

29. In early February, 1983, plaintiff was again promoted and became a Class 4 casting operator on "B" shift. (Defendant's Exhibit 4). Plaintiff's

supervisors on this shift were Tim Williams and Melvin Elvis. (Transcript at 92, 946).

30. Plaintiff had worked "B" shift overtime on numerous occasions prior to her assignment to "B" shift and knew the people, the assignments, and the jobs on that shift. (Transcript at 1477). Thus, her supervision felt that an immediate, formal orientation upon her beginning work on "B" shift was not necessary. (Transcript at 1477-1478).

The Staring Incident

31. At 8:00 O'clock A.M., on February 28, 1983, plaintiff reported to Du Pont's medical department complaining of a "funny feeling" and "almost passing out." (Plaintiff's Exhibit 97). In addition to telling the nurse that she was short of breath, plaintiff was pale and had an elevated, irregular pulse. Id. Following the nurse's recommendation, plaintiff contacted her physican. (Transcript at

98; Plaintiff's Exhibit 97). Plaintiff was hospitalized for four days. (Transcript at 99). As a result of this illness and hospitalization, plaintiff missed almost four full days of work. (Defendant's Exhibit 57).

32. Plaintiff testified that Steve Love brought on this illness by staring at her for forty to forty-five minutes. (Transcript at 97). The court, however, finds more credible and believable the testimony of Steve Love that he neither stared at plaintiff nor took any action to threaten or intimidate her. (Transcript at 1477, 1135-1136).

33. On March 19, 1983, Melvin Elvis and Tim Williams met with plaintiff to discuss her attendance at work. (Transcript at 950, 1085; Defendant's Exhibit 39). After this meeting, plaintiff's attitude was good, and her supervision believed that they were going to be able to work with her to improve her atten-

dance. (Transcript at 950). Although putting plaintiff on special review had been discussed among the supervisory personnel, Melvin Elvis and Tim Williams felt that plaintiff's problem with attendance could best be dealt with by less severe measures. Therefore, plaintiff was not placed on special review at this time. (Transcript at 1085, 1351; Defendant's Exhibit 39).

34. Shortly after being transferred to "B" shift, plaintiff was assigned to be a rewinder operator because it was a logical assignment considering her experience and because her supervision felt this job would not generate stress. (Transcript at 1144-1145; Plaintiff's Exhibit 26).

35. In May, 1983, MelvinElvis transferred off "B" shift, and Robert Mack replaced him as plaintiff's foreman. (Transcript at 951).

36. In August, 1983, plaintiff, who

was a Class 4 employee, was offered an opportunity to transfer to a Class 3 job in casting. Plaintiff declined to accept this transfer. (Transcript at 1086-1087, 1332-1333; Defendant's Exhibit 5). Although such a transfer would have meant that plaintiff would have different supervisors, it would have also meant that she would have had to take a reduction to a Class 3 employee, pursuant to Du Pont's seniority system. (Transcript at 1449).

37. On November 8, 1983, plaintiff was injured on the job when a wrench fell on her foot. (Transcript at 111; Plaintiff's Exhibit 97). Dr. Denton, another plant physician, recommended that although plaintiff could perform regular work, she should be shielded from performing excessive walking for approximately one week and kept from lifting, stooping, or straining. (Defendant's Exhibit 98).

The Door Slamming Incident

38. In late November or early

December, 1983, plaintiff had occasion to go to Robert Mack's office seeking help with a job procedure that had recently been changed. (Transcript at 114, 1145). When plaintiff approached the foreman's office, Sherrill Evans, who was one of plaintiff's co-workers, Robert Mack and Tim Williams were sitting in Robert Mack's office talking. (Transcript at 867). When plaintiff asked to speak to Robert Mack privately, Mack rose and suggested that the two of them go next door to Tim Williams' unoccupied office to talk. Id. Just after Mack and plaintiff had left Mack's office, Williams pushed the door to Mack's office closed, and it slammed. (Transcript at 810, 867-868, and 1147). Plaintiff had turned to reenter Mack's office just as the door slammed. (Transcript at 810). Williams, however, could not see her approaching because his back was turned. (Transcript at 810-811).

39. Plaintiff believed that Williams

had intentionally slammed the door "in her face" and complained to Sherrill Evans about the incident. (Transcript at 811). Later in the shift, plaintiff again went to see Mack and complained of Williams' behavior. (Transcript at 868; Plaintiff's Exhibit 22). In the interest of fostering good working relationships among the employees on his shift, Mack assured plaintiff that he would set up an appointment with Williams for the purpose of discussing this incident. (Transcript at 868-869).

40. When Williams reported to work the next day, Mack told him that plaintiff was upset and that he was to talk with her and try to resolve the situation. (Transcript at 869, 1147-1148).

41. After his discussion with Mack, Williams called plaintiff into his office for a talk. (Transcript at 117, 1148). Initially, Williams apologized to plaintiff for slamming the door and

explained that he had just "overpushed" the door. He assured plaintiff that the slamming of the door had not been aimed at her. (Transcript at 1148). After Williams' initial apology, plaintiff broadened the conversation and a discussion covering many aspects of plaintiff's employment ensued. Tempers flared, and, as Williams put it, a two-way loss of control occurred. (Transcript at 1090, 1148). However, after Williams left the room temporarily, things calmed down and a long discussion ensued. The meeting ended on a positive note with both Williams and plaintiff agreeing to try to work together. (Transcript at 118, 1148-1151).

42. In order to keep his supervision informed, Williams composed a memorandum concerning the door slamming incident and the discussion with plaintiff that had followed. (Plaintiff's Exhibit 27). Rough drafts of this memorandum preceded the final copy. (Transcript at 163-164,

1151; Plaintiff's Exhibits 23, 24, 25, and 40).

43. The following morning, Williams telephoned Patterson and told him of the incident. (Transcript at 1092, 1152, and 1338). Patterson made notes concerning this conversation with Williams. (Transcript at 1337, 1339; Plaintiff's Exhibit 26).

44. Patterson called Terry Baldwin of personnel, and the two of them discussed Patterson's conversation with Williams. (Transcript at 1339). Baldwin's advice was that Patterson should have Mack and Williams document what was said and that Mack, Williams, and plaintiff should be brought before Patterson for a discussion. In addition, Baldwin noted that insubordination would not be tolerated. (Transcript at 1339-1340; Plaintiff's Exhibit 26).

45. On December 7, 1983, Patterson had a discussion in his office with

Mack, Williams, and plaintiff. (Transcript at 1340). The top half of Plaintiff's Exhibit 28 reflects Patterson's objectives for that meeting. (Transcript at 1340; Plaintiff's Exhibit 28). Patterson went over each item on Plaintiff's Exhibit 28 with Mack, Williams, and plaintiff. (Transcript at 870). Patterson convened this meeting so he could determine what had, in fact, occurred and could set these three on a path of working together in the future. (Transcript at 1344). The bottom half of Plaintiff's Exhibit 28 reflects Patterson's opinions and summary of this meeting. (Transcript at 1343). He noted that plaintiff did not feel this had been an important incident, but that she understood the items listed on this exhibit. He futher noted that plaintiff said she did not have any problems with Williams or Mack. (Transcript at 1343; Plaintiff's Exhibit 28). Patterson did not threaten to discharge plaintiff or

place her on probation at this meeting. (Transcript at 1343).

46. In December, 1983, plaintiff refused an opportunity to transfer out of Cronar to a Class 3 Mylar casting job. (Transcript at 1344-1345; Defendant's Exhibits 6, 58).

47. Following the door slamming incident, plaintiff mistakenly believed "that supervision was actively after [her] again." Her chronic diarrhea returned. (Transcript at 138).

48. In February, 1984, Mack, plaintiff's foreman on "B" shift, gave plaintiff her annual employee performance review. (Transcript at 875-876; Plaintiff's Exhibit 87). Plaintiff's overall rating was "good". (Plaintiff's Exhibit 87). At that time, plaintiff commented,"I have no complaints about my job or my supervision. I enjoy my work and hope to move to other areas when time permits." (Transcript at 876; Plaintiff's Exhibit 87).

49. In March, 1984, plaintiff experienced problems with her back. She saw Dr. Denton [plant physician] on March 16th and March 26th and was placed on guided work on each of these visits. (Plaintiff's Exhibit 97).

50. On March 28, 1984, plaintiff was sent home by her foreman due to "much pain". (Plaintiff's Exhibit 97).

51. On March 31, 1984, plaintiff underwent ovarian cyst surgery. (Transcript at 139; Plaintiff's Exhibit 97).

52. When a Du Pont employee is out on disability, the employee must notify her immediate supervisor about her status, or the supervisor will contact the employee periodically while she is absent from work. (Transcript at 140).

53. Williams and plaintiff talked on several occasions while plaintiff was out on disability due to her surgery. (Transcript at 1162). Although plaintiff was concerned about her disability record,

Williams assured her that she should follow her doctor's instructions, that she should return to work when her doctor released her, and that they would worry about her attendance problems then. (Transcript at 1162-1163).

54. On April 18, 1984, plaintiff returned to work and received a nominal contact concerning attendance. (Transcript at 141). Plaintiff was placed on guided work for four (4) to six (6) hours a day. (Transcript at 878-879; Plaintiff's Exhibit 97; Defendant's Exhibit 41).

55. As of May 11, 1984, plaintiff was still restricted to not lifting more than forty to forty-five pounds. (Transcript at 1349; Plaintiff's Exhibit 97; Defendant's Exhibit 42, 65). Such a restriction constituted light duty, and would prevent plaintiff from performing all of her normal job duties. (Transcript at 879-880, 1349).

56. During May, 1984, while plaintiff was still on a lifting restriction following her surgery, Mack and Williams discussed the possibility of plaintiff transferring to a job in the control lab in the Mylar division. Plaintiff had expressed an interest in transferring to such a job, and therefore, her supervision looked into the possibility of transfer. Although the idea was presented to higher supervision, plaintiff was not transferred to the lab because no job opening existed there and because Du Pont policy did not allow for such special transfers except in very unusual circumstances. It was felt that plaintiff did not warrant such an exception to the usual seniority transfer system. (Transcript at 877-878, 1096-1097, 1165-1166; Plaintiff's Exhibit 30).

57. On May 21, 22, 23 and 24, 1984, Mack, plaintiff's foreman on "B" shift, made some notes concerning plaintiff's job performance and daily occurrences.

(Plaintiff's Exhibits 32, 33, 34, and 35). Mack made these notes for his own future reference concerning the events and occurrences of these days. He did not discuss all of these events with plaintiff. These notes were not made to harass plaintiff, but simply to document these events and to jog Mack's memory in the event it became necesssary to discuss these events with plaintiff. Mack made similar notes concerning male employees. (Transcript at 881-887).

The Six-Month Attendance Goal

58. On June 4, 1984, Williams and Mack met with plaintiff to discuss a six-month attendance goal with her. Although Williams and Mack intended to help plaintiff by giving her a reasonable and obtainable goal to work toward, plaintiff was resentful and confused about the contact. During the meeting, plaintiff brought out her notebook and began taking down notes. Supervision felt that the

contact was not received as it had been intended. (Transcript at 887-889, 890, 1100-1104, 1170-1177; Plaintiff's Exhibits 38, 39, 41, and 67).

59. On June 8, 1984, Williams made several notes concerning plaintiff, her physical condition, and her work performance. One of these notes reflects that, although plaintiff had seen Dr. Early on May 22nd concerning a stressful work situation, Mack and Williams had not been contacted concerning this situation. (Plaintiff's Exhibit 43). Williams' notes also reflect that plaintiff had "pulled her back" lifting something on June 6, 1984, and that Dr. Denton had decreased her lifting ability to twenty-five pounds and continued her on light duty. (Plaintiff's Exhibits 43, 44). Another one of Williams' notes of June 8, 1984, reflects that although plaintiff was complaining that she was not receiving assistance in performing her job, the job she was

performing was designed to be a one-person job with only occasional assistance necessary and that plaintiff was receiving this occasional assistance. (Transcript at 1107; Plaintiff's Exhibit 68). This note also reflects Williams' opinion that plaintiff's attitude and job performance were completely unsatisfactory on June 8, 1984. (Plaintiff's Exhibit 68).

60. Plaintiff was on light duty from June 8 to June 18, 1984. During this time, she was not to lift greater than twenty-five pounds. On June 18, 1984, Dr. Denton cleared her for regular work, with the restriction that she not work overtime for two (2) weeks. (Plaintiff's Exhibit 97; Defendant's Exhibit 99).

61. On June 10, 1984, Williams noted that plaintiff, who was still on light duty, was complaining of an upset stomach and had performed very little work that day, having stayed in the break room most of the time. (Transcript at 163, 1106; Plaintiff's Exhibit 42).

62. On June 11, 1984, Melvin Elvis replaced Robert Mack as plaintiff's foreman on "B" shift. (Transcript at 951, 1108, and 1191).

63. On June 18, 1984, Elvis, who was now plaintiff's foreman on "B" shift, noticed that plaintiff was taking excessive breaks away from her job. Following his usual practice, he made himself a note that he had contacted plaintiff regarding this problem. (Transcript at 952, Plaintiff's Exhibit 66).

The Special Review

64. Shortly after coming to "B" shift, Elvis assembled and reviewed plaintiff's attendance records. (Transcript at 954). After conferring with his supervisors, a decision was reached to place plaintiff on special review concerning her attendance. Id. Special review is intended to make an employee aware of supervisions' concerns and to

notify the employee of the conduct needed to become an acceptable employee. (Transcript at 1574). Elvis assembled plaintiff's attendance records and presented the special review form to plaintiff. (Transcript at 954). This special review overlapped the six-month attendance goal that plaintiff had been presented by Mack and Williams. (Transcript at 954-955). Elvis explained the attendance special review to plaintiff, but plaintiff refused to sign the special review form. (Transcript at 955-956).

65. After it was brought to Elvis' attention that he had put the special review on an outdated form, he rewrote the special review on the correct form and gave plaintiff another opportunity to sign it. (Transcript at 956, 1574). Plaintiff refused to sign it because the special review overlapped with her previously established six-month attendance goal. To accomodate plaintiff, Elvis changed the

date on the special review to reflect the date that plaintiff's six-month attendance goal was begun. Thus, plaintiff would get credit for time without disability that she had accumulated since the six-month attendance goal had begun. (Transcript at 956-957). Plaintiff still refused to sign the form. (Transcript at 957).

66. Later in September, 1984, plaintiff filed a grievance asserting that supervision had not followed the proper procedures in placing her on special review. (Transcript at 1575; Plaintiff's Exhibits 82, 83, and 93).

67. In late September, 1984, Don Bellefeuil, Cronar product superintendent, met with plaintiff to hear her grievance. (Transcript at 1570, 1575).

68. Bellefeuil decided to destroy the special review because plaintiff had already spent approximately five months without further absences, and therefore, he felt that the special review had served

its purpose. In addition, he felt that the special review had not been handled well or expeditiously. Accordingly, on October 3, 1984, Bellefeuil shredded the special review. (Transcript at 231, 1575-1576).

The Touching Incident

69. At approximately 3:00 O'Clock A.M. on the morning of July 31, 1984, Cecil Hooks, one of plaintiff's co-workers, sexually assaulted plaintiff by touching or grabbing her on the breast. (Transcript at 167, 169). This was an unprovoked event. (Transcript at 169).

70. Just after this occurred John Slaughter, another of plaintiff's co-workers, arrived on the scene. Plaintiff told him what had happened, and he advised her to report the incident to supervision. (Transcript at 169-170).

71. Plaintiff then reported the incident to Elvis, although, per his request, she did not tell him the name of

the offending employee. (Transcript at 170; Defendant's Exhibit 26). Plaintiff stressed that she wanted the incident kept confidential. (Transcript at 960-961).

72. Elvis contacted Harold Horton, who evidently was Cecil Hooks' foreman, and asked Horton to talk to plaintiff about the incident. Horton agreed. (Defendant's Exhibits 26, 82).

73. Plaintiff relayed what had happened, including the name of the offending employee, Cecil Hooks, to Horton. Horton promised to talk to Hooks and asked plaintiff if she would like for Hooks to apologize to her. Plaintiff indicated that she would like an apology. (Defendant's Exhibit 82).

74. As a result of Horton's discussion with Hooks, Hooks apologized to plaintiff, and plaintiff accepted his apology. (Defendant's Exhibits 26, 82).

75. Plaintiff contacted both Horton and Elvis prior to the end of the shift

and assured them that the matter had been resolved and had been kept confidential as she had requested. (Defendant's Exhibits 26, 82).

76. Plaintiff, however, became worried that rumors concerning the incident had begun. (Transcript at 172). Plaintiff, therefore, changed her mind about not reporting the incident to others in supervision and personnel. Two things changed plaintiff's mind: (1) Wade Moore, another co-worker, stuck his head into the room where plaintiff was working and grinned, indicating to plaintiff that he knew what had happened; and (2) plaintiff had confided in John Slaughter after the incident and had sought his advice on what action to take. (Transcript at 1357-1358; Defendant's Exhibit 67).

77. Plaintiff, therefore, returned to Du Pont the following morning, with her husband, and reported the incident to higher supervision and personnel. A

meeting among plaintiff, Harold Hatfield, Patterson, and Baldwin ensued in Baldwin's office. Plaintiff was assured that:

(1) The charges were serious & would be investigated.

(2) She had done the proper thing by reporting the incident.

(3) The matter would be handled in a confidential manner.

(4) She would not be harassed for this or any other reason.

(Defendant's Exhibit 67).

78. On August 2, 1984, Carroll Enzor, a member of supervision, advised another female operator who was talking about this incident that "it would be better if she let things blow over [and] did not get involved in it." (Defendant's Exhibit 22).

79. When Elvis learned that plaintiff had gone over his head and reported the incident to his supervision and personnel, after assuring him that the incident had been resolved, he was not pleased. On August 3, 1984, Elvis had a meeting with plaintiff. During this meeting, plaintiff

indicated that she had been satisfied with Elvis' and Horton's handling of the incident. Elvis told plaintiff that rumors were circulating because plaintiff was talking about the incident and that neither he nor Horton had told anyone of it. (Plaintiff's Exhibit 92).

80. On August 3, 1984, Cecil Hooks was placed on probation because of this incident. (Plaintiff's Exhibits 90, 91).

81. Also on August 3, 1984, plaintiff had a meeting with Love and others to follow up on this incident. During this meeting, plaintiff received some good advice. She was told to try to control herself and to ignore any comments that were made to her or to simply walk away. Plaintiff was encouraged to tell supervision about any problems that ensued. Plaintiff was assured that supervision intended to manage the area to the best of their ability to prevent any type of sexual harassment. (Defendant's Exhibit 84).

Events Following the Touching Incident Including the Trash Can Incident

82. Plaintiff did experience some adverse conditions following the sexual assault incident. (Plaintiff's Exhibits 62, 63). However, these adverse conditions were not completely the fault of others. For example, in a memorandum dated August 8, 1984, Love mentioned that plaintiff was getting some verbal abuse not only over the incident but also over her non-cooperation with others. Love also mentioned that Williams and Elvis were spending much time working on the situation and were trying to keep things under control.

83. Other adverse reactions experienced by plaintiff included operators not talking or associating with her. (Plaintiff's Exhibits 70, 85). In addition, plaintiff testified that on August 25, 1984, she discovered some vulgar graffiti directed at her in one of

the women's restrooms at Du Pont. (Transcript at 210-211). Although it seems unusual considering plaintiff's behavior on other occasions, there is no indication in the record that plaintiff ever reported this occurrence to anyone. There is also no evidence in the record concerning who may have authored this graffiti.

84. In August, 1984, plaintiff reported to Elvis that she had not emptied one trash can because it was full of concrete and was too heavy for her. (Transcript at 189-190, 983-984; Plaintiff's Exhibit 77).

85. The following night Elvis checked what he thought was the offending trash can and found it could be lifted easily. (Transcript at 191, 984; Plaintiff's Exhibit 77).

86. Elvis told plaintiff to empty the trash can but to get some help if it was too heavy for her. (Transcript at 984).

87. Plaintiff attempted to empty the trash can without asking anybody to help her. (Transcript at 563).

88. The trash can fell backwards against the plaintiff when she tried to empty it into the dumpster. (Plaintiff's Exhibit 77).

89. The following day, August 26, 1984, plaintiff reported to medical complaining of a bruise on her leg from the trash can incident. Plaintiff was taken to a physician at McLeod Regional Medical Center in Florence, South Carolina. (Plaintiff's Exhibit 77; Defendant's Exhibit 27). The doctor reported that plaintiff needed to stay off her leg for three to five days, but that the bruise was of no great significance. (Defendant's Exhibit 27).

90. Plaintiff, however, continued to exacerbate the situation on her shift. She made comments to other operators to the effect that if anyone ever touched her

PUBLISHER'S NOTE:

The following pages are unavailable for filming:

51, 52, 53, 54

plant manager and his superintendents. At the June 23, 1985, staff meeting, Plaintiff's Exhibit 109, which was prepared by Steve Love with input from Melvin Elvis, Tim Williams, Bob Patterson, and Dr. Denton, was presented with the recommendation for termination. Staff determined that three options were available depending on plaintiff's medical condition. If plaintiff remained ill until late August, 1985, her six-month disability wage plan would expire. If this occurred, she would either have to be granted a leave of absence without pay or be terminated while still ill. If, however, prior to the expiration of her disability wage plan, the cause of plaintiff's illness was discovered and she was cured, she could return to work as a cured individual with a good prognosis for availability for work. If, on the other hand, plaintiff was improving but retained a poor prognosis for good health in the

future, she might be terminated if staff concurred in the decision at that time. Accordingly, staff requested Dr. Denton to provide a report on plaintiff's current medical condition. (Transcript at 1506-1509).

102. On June 27, 1985, Dr. Denton opined that plaintiff's problems had a poor prognosis and that, at that time, she was incapable of performing industrial type work. (Defendant's Exhibit 14).

103. Dr. Denton examined plaintiff on July 24, 1985, and determined that plaintiff was able to return to regular work beginning August 2, 1985. (Defendant's Exhibit 15). However, Dr. Denton's long-term prognosis concerning plaintiff's illness did not change. (Transcript at 1286-1287; Defendant's Exhibit 15).

104. On July 30, 1985, staff was informed that although plaintiff had improved and was slated to return to work, she had not been cured and her long-term

prognosis had not changed. Staff concurred in the recommendation for termination. (Transcript at 1510).

105. When plaintiff returned to the plant on August 2, 1985, she was summoned to a meeting with Elvis and Love. They informed plaintiff that she was being terminated because "[she was] unsuited for our type of industrial employment because [she had] not demonstrated the ability to perform [her] regular job assignment for halth reasons and the prognosis does not reflect sustained improvement." (Transcript at 1580-1581; Defendant's Exhibit 31).

106. Elvis' and Love's discussion with plaintiff was calm and without incident. (Defendant's Exhibit 86).

107. At the Du Pont plant in Florence, South Carolina, no employee with as much unavailability for work or undependabiiity as plaintiff has not been terminated. (Transcript at 1613).

108. Code 440 is one of Du Pont's pay codes. According to company policy, it is to be used for diagnostic, observation, and therapy treatment. (Plaintiff's Exhibit 101). Wages paid on Code 440 do not come out of the disability wage account fund. Therefore, when the disability dollars spent per eligible employee is calculated each month, the resulting figure does not reflect disability time covered under Code 440. This figure is used to reflect cost parameters. Code 440 is misunderstood and not consistently administered. Time credited to Code 440 is included when Du Pont calculates an individual employee's accountability or dependability for work. (Transcript at 1393-1399; 1592-1593).

109. Plaintiff was trained to perform her job assignments. She received as much or more training as male employees of Du Pont in Florence. (Transcript at 751, 813, 847).

110. After plaintiff had one year of service with Du Pont, she was eligible for and was paid under the disability wage plan because her illnesses were considered to be legitimate. (Transcript at 1320-1321, 1581, 1591; Defendant's Exhibit 1).

CONCLUSIONS OF LAW

This court has jurisdiction over this matter pursuant to 42 U.S.C. Sec. 2000e-5(f)(1) and (3), and 28 U.S.C. Sec. 1331.

Although it is not contested that plaintiff timely filed the instant action after receiving her "right to sue" letter from the Equal Employment Opportunity Commission (hereinafter the "EEOC", Du Pont asserts that all of plaintiff's allegations concerning events that occurred more than 300 days prior to the filing of Plaintiff's claim with the EEOC on November 19, 1985, are time-barred. 42 U.S.C. Sec. 2000e-5(e).

Plaintiff was discharged from Du Pont on August 2, 1985. Plaintiff alleges that

this discharge was wrongful and retaliatory. In addition, plaintiff alleges that her termination was the culmination of a sexually hostile work environment that had persisted for some time.

Although the events plaintiff complains of that occurred more than 300 days prior to the filing of her EEOC charge are not separately actionable, they do constitute relevant background evidence in a proceeding challenging a current practice. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977). Plaintiff's termination, which is alleged to have been discriminatory, occurred within the 300-day period. Moreover, plaintiff alleges that the sexually hostile work environment continued to and resulted in this termination. Plaintiff is challenging events that occurred during the 300-day period, and therefore, prior events constitute relevant background evidence concerning the validity of

plaintiff's claims.

In one of her causes of action, plaintiff asserts that she was subjeted to a sexually hostile work environment in violation of 42 U.S.C. Sec. 2000e-2(a)(1). This statute provides that:

> [i]t shall be an unlawful employment practice for an employer...to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. ...

42 U.S.C. Sec. 2000e-2(a)(1).

The Supreme Court recently recognized that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. Meritor Savings Bank v. Vinson, 477 U.S. _____, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). However, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of

[the victim's] employment and create an abusive working environment.'" Meritor, 106 S.Ct. at 2406 (citation omitted).

In holding that a cause of action for hostile environment sexual harassment exists, the Supreme Court relied, in part, on the EEOC's Guidelines on Discrimination Because of Sex. 29 C.F.R. Sec. 1604.11. This regulation provides, in pertinent part, that:

> [h]arassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. ...
>
> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. Sec. 1604.11(a) and (b).

In Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), the Fourth Circuit posited a two step analysis of the order of proof in a sexual harassment claim:

> First, the plaintiff must make a prima facie showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.

Katz, 709 F.2d at 256.

Other circuits have described the order of proof of a sexually hostile work environment claim rather differently and have required plaintiffs to allege and prove a number of elements. These elements are:

(1) [that] [t]he employee belongs to a protected group;

(2) [that] [t]he employee was subject to unwelcome sexual harassment;

(3) [that] [t]he harassment complained of was based upon sex;

(4) [that] [t]he harassment complained of affected a "'term, condition, or privilege'" of employment; [and]

(5) [r]espondeat superior.

Henson v. City of Dundee, 682 F.2d 897, 903-905 (11th Cir. 1982); See also Rabidue v. Osceola Refining Company, 805 F.2d 611, 619-620 (6th Cir. 1986), cert. denied, 55 U.S.L.W. 3746 (U.S. May 5, 1987) (No. 86-1472).

While acknowledging the manner in which other circuits analyze claims of sexually hostile working environments, this court elects to follow the order of proof approved by the Fourth Circuit in Katz. Katz, 709 F.2d at 255-256.

Accordingly, plaintiff is first required to make a prima facie showing that sexually harassing actions took place. Katz, 709 F.2d at 256. If this is done, Du Pont may rebut the showing either directly, by proving that the events did

not take place, or indirectly, by showing that they were isolated or genuinely trivial. Id.

Plaintiff has clearly shown that two sexually harassing events occurred during her employment at Du Pont: the Cecil Hooks touching incident and the sexually explicit graffiti incident. See Findings of Fact 69, 83. However, it is clear that these two incidents, in and of themselves, cannot support a claim of a sexually hostile work environment. As the Supreme Court noted in Meritor, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor, 106 S.Ct. at 2406 (citation omitted).

> Furthermore, [u]nlike quid pro quo sexual harassment which may evolve from a single incident, sexually hostile or intimidating environments are characterized by multiple and varied combinations and frequencies of offensive exposures, which characteristics would dictate an order of proof that placed

> the burden upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency.

Rabidue, 805 F.2d at 620.

Thus, standing alone, these two isolated events do not satisfy the first step in the order of proof of a claim for a sexually hostile work environment. Katz, 709 F.2d at 256.

Plaintiff, however, complains of other work place incidents, asserting that these actions also constitute "sexual harassment". The incidents complained of, inter alia, include repeated contacts by supervision over attendance, misuse of Code 440 by supervision, a lack of training by supervision, as well as the wheel room incident, the staring incident, and the door slamming incident.

The court finds, however, that plaintiff has greatly overexaggerated or misconstrued these and other alleged incidents or occurrences. For example,

plaintiff's contacts on attendance were not intended to harass or intimidate her, but to help her improve her attendance record. See Findings of Fact 14-15, 33, 52-54, 58, and 64. The six-month attendance goal and the thwarted special review were also intended to help plaintiff improve her attendance record. See Findings of Fact 58-68. Furthermore, plaintiff received as much or more training as her male counterparts. See Findings of Fact 30, 109.

In addition, Code 440 was not used to harass or discriminate against plaintiff. Admittedly, Code 440 was not uniformly administered. See Finding of Fact 108. However, variations in the use of Code 440 resulted from confusion among supervision and not from a desire to harass or discriminate against plaintiff. See Finding of Fact 108. Time missed from work and listed as Code 440 is included when a Du Pont employee's dependability is

calculated. Therefore, the misuse or nonuse of Code 440 had no bearing on the ultimate determination that plaintiff was undependable. See Finding of Fact 108.

The court also believes that plaintiff misconstrued, misinterpreted, or over-reacted to the actions of her supervision during the wheel room incident and the door slamming incident. DeTitta's actions in the wheel room were motivated entirely out of concern for plaintiff's safety, and that of other employees treated similarly. See Finding of Fact 9. Everyone that did not have on a hot suit was removed from the wheel room by DeTitta. See Finding of Fact 8. Any touching that occurred between DeTitta and plaintiff was not intended to harass or discriminate against her. See Findings of Fact 9, 10.

Likewise, the door slamming incident was not intended to harass plaintiff. See Findings of Fact 38, 41. Tim Williams' slamming of the door was unintentional.

See Finding of Fact 41. Furthermore, the court finds that Steve Love never stared at plaintiff for forty-five minutes nor was he responsible for her illness of February 28, 1983. See Finding of Fact 32.

Even if all of the incidents plaintiff describes were deemed to have occurred as she alleges, they would still have to be found to be sexually harassing before plaintiff could satisfy the first element of her burden of proof. Katz, 709 F.2d at 256. In other words, plaintiff would have to show that, but for her sex, the alleged harassment would not have occurred. McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985). Besides plaintiff's allegations that women were not wanted or welcomed at Du Pont, there is no persuasive evidence that any of these alleged incidents occurred because plaintiff was a female. Even assuming, arguendo, that these events occurred as plaintiff contends, they occurred because plaintiff

mistrusted supervision, had difficulty dealing with people, and threatened and intimidated her co-workers. See Findings of Fact 13, 82, 90. Plaintiff has failed to show that any of these incidents occurred because of her sex. Accordingly, the court finds that plaintiff has not satisfied the first step of the Katz analysis.

However, even if plaintiff had made a prima facie showing satisfying the first step of the Katz analysis, Du Pont would still be entitled to prevail because plaintiff has also failed to prove the existence of the second step of the Katz analysis. The only "sexual" harassment that plaintiff has shown consists of the Cecil Hooks touching incident and the restroom graffiti incident. It is abundantly clear that Du Pont took "prompt remedial action rasonably calculated to end [any] harassment" that occurred following the Cecil Hooks touching

incident. Katz, 709 F.2d at 256; See Findings of Fact 77, 78, 81, 91-96. Even though plaintiff's obsession with the touching incident contributed in large measure to an attitude of distrust among her co-workers, Du Pont emphasized that plaintiff's co-workers had to work in harmony with plaintiff. See Findings of Fact 91-94, 96. Furthermore, plaintiff never made any showing that Du Pont knew or should have known of the graffiti incident. Katz, 709 F.2d at 256; See Finding of Fact 83. Thus, even if plaintiff could satisfy the first step of the Katz analysis, her cause of action for a sexually hostile work environment would still ultimately fail.

The plaintiff, however, has also asserted a Title VII cause of action for wrongful discharge. In a cause of action for wrongful discharge, the plaintiff has the burden of initially proving by the preponderance of the evidence a prima

facie case of discrimination. If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Then, should the defendant carry this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

In order to make out a prima facie case of discrimination, a plaintiff must show (1) that she is a member of a protected minority; (2) that she was qualified for the job from which she was discharged; (3) that she was discharged; and (4) after she was discharged her employer filled her

position with a nonminority.[3] Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979). The evidence at trial established that plaintiff was, in fact, a member of a protected minority and that she was discharged. See Findings of Fact 1, 105.

However, plaintiff has failed to establish that she was, in fact, qualified for the job from which she was discharged. Although plaintiff performed her job adequately when she was present at work, she was ultimately discharged for unsuitability for industrial type work due to excessive absenteeism. See Findings of Fact 48, 105.

DuPont policy requires employees to be at work whenever possible. See Finding of

---

[3] In the instant case, plaintiff will not be required to make a showing that her position was filled with a nonminority, since Du Pont, due to staff reductions, has not filled plaintiff's position. (Transcript at 1646-1647).

Fact 12. Excessive absenteeism, whether for medical or other reasons, is a ground for termination of employment from Du Pont. Id. A hardship, in the form of increased duties and responsibilities, is placed on the remaining employees when one employee is absent from work. Id. At Du Pont in Florence, no employee with as much unavailability for work or undependability as plaintiff has not been terminated. See Finding of Fact 107. Thus, due to her excessive absenteeism, plaintiff was not available, and was accordingly not qualified, to perform her job at Du Pont. Plaintiff has, therefore, failed to establish a prima facie case of wrongful discharge.

Assuming, arguendo, that plaintiff had established a prima facie case of discrimination, the burden would shift to Du Pont to articulate some legitimate, nondiscriminatory reason for plaintiff's discharge. McDonnell Douglas, 93 S.Ct. at

1824. Du Pont discharged plaintiff because she was unsuited for industrial employment. Du Pont reached this conclusion because plaintiff had not demonstrated the ability to perform her job due to health reasons and because plaintiff's prognosis did not reflect sustained improvement. See Findings of Fact 101-105. Du Pont's explanation of plaintiff's termination suffices to meet its burden at this stage.

Thus, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 93 S.Ct. at 1826.

Plaintiff alleges that her health problems, and thus her absences, were caused by Du Pont's sexual discrimination. Therefore, plaintiff alleges that because Du Pont itself was responsible for her

absenteeism, her discharge was pretextual.

Plaintiff, however, has not met her burden of showing that her discharge was a pretext for discrimination or that she was, in fact, subjected to sexual discrimination at Du Pont. Plaintiff was discharged for unsuitability for industrial type work because of excessive absenteeism that had a poor prognosis for improvement. See Findings of Fact 101-105. Every employee at the Du Pont plant in Florence with as much unavailability for work as plaintiff has been terminated. See Finding of Fact 107. Moreover, Du Pont tried to help plaintiff improve her health and her attendance record. See Findings of Fact 14-15, 21-22, 33, 53-54, 58, 64, 95. Furthermore, Du Pont would not have terminated plaintiff if she had been cured and had a good prognosis for future dependability. See Finding of Fact 101. Finally, Du Pont made it clear that, rather than support and foster dis-

crimination as plaintiff claims, it would not tolerate any mistreatment or differential treatment of plaintiff. See Findings of Fact 77, 81, 91-94, 96. Accordingly, the court finds that plaintiff was discharged for legitimate, nondiscriminatory reasons that were not pretextual and therefore that her cause of action for wrongful discharge must fail.

Plaintiff has also brought a cause of action for unlawful retaliation pursuant to 42 U.S.C. Sec. 2000e-3(a). This statute provides in pertinent part that:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter ....

42 U.S.C. Sec. 2000e-3(a).

The sequence of proof previously described as being required by McDonnell Douglas is applicable to retaliation cases

as well. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). Thus,

> [t]he employee is initially required to establish a prima facie case of retaliation by a preponderance of the evidence. Such a prima facie case consists of three elements: 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action.

Ross, 759 F.2d at 365.

It is undisputed that plaintiff, by making various complaints, including her complaint concerning the Cecil Hooks' touching incident, engaged in activity protected by Title VII. It is also undisputed that adverse employment action was taken against plaintiff since she was, in fact, terminated. Plaintiff's difficulties begin, however, on the third requirement for a prima facie case of retaliation.

Although plaintiff seeks to prove that her protected activity gave rise to her

harassment and ultimately, to her termination, she has failed to establish the required causal link between these events. Rather than foster retaliation against plaintiff, Du Pont took positive steps to remedy the admittedly difficult situation between plaintiff and her co-workers. See Findings of Fact 77-78, 81, 91-96. Furthermore, this difficult situation between plaintiff and her co-workers was not initiated by plaintiff engaging in protected activity, but by her persistence in bringing up the incident and by her threats against co-workers and their jobs. See Findings of fact 82, 90. Plaintiff's contacts on attendance were normal and designed to help, not hinder or harass, plaintiff. See Findings of Fact 14-15, 33, 52-54, 58, and 64. Moreover, Code 440 was not used to retaliate against plaintiff. See Finding of Fact 108. Although plaintiff claims supervision retaliated against her by failing to train

her, plaintiff received the same amount or more training than her co-workers. See Findings of Fact 30, 109. In sum, plaintiff has simply failed to establish the existence of a causal link between her engagement in protected activities and any adverse employment action taken against her.

Even if plaintiff were deemed to have met her burden of establishing a prima facie case of discrimination, she would still not be entitled to prevail on this cause of action. If plaintiff presented a prima facie case, Du Pont would then have the burden of producing a legitimate nondiscriminatory reason for the adverse employment action in order to rebut the presumption of retaliation raised by plaintiff's prima facie case. Ross, 759 F.2d at 365. Du Pont has done this by explaining that plaintiff was discharged for unsuitability for industrial type work because of excessive absenteeism with no

prognosis for improvement. See Findings of Fact 101-105. The burden would then shift back to plaintiff to prove retaliation by demonstrating that Du Pont's explanation is pretextual. Ross, 759 F.2d at 365.

There is simply no persuasive evidence that Du Pont's stated reason for terminating plaintiff is actually a pretext for retaliation. As previously stated, rather than retaliate against plaintiff, Du Pont took remedial action to end the unpleasant situation between plaintiff and her co-workers. See Findings of Fact 77-78, 81, 91-96. Du Pont let it be known, both to plaintiff and her co-workers, that plaintiff was not to be harassed, but was to be treated like any other employee. See Findings of Fact 77, 81, 91-94, 96. Such actions and attitudes on Du Pont's part fly in the face of a finding that Du Pont was engaging in retaliation against the plaintiff. Therefore, even if

plaintiff was found to have established a prima facie case of discrimination, her cause of action for retaliation would ultimately fail.

Based on the forgoing Findings of Fact and Conclusions of Law, the plaintiff's claims that she was discriminated against on the basis of her sex must be rejected and defendant is entitled to judgment in its favor.

The court cannot conclude that plaintiff's claims were "frivolous, unreasonable and without merit" so as to entitle defendant to an award of attorney's fees. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). See also Glymph v. Spartanburg General Hosp., 783 F.2d 476 (4th Cir. 1986). Accordingly, the court, in its discretion, declines to award attorney's fees to the defendant as part

of its recoverable costs. 42 U.S.C. Section 2000e-5.

IT IS SO ORDERED at Columbia, South Carolina, this 2nd day of September, 1987.

/s/ Clyde H. Hamilton
Clyde H. Hamilton
UNITED STATES DISTRICT JUDGE

A TRUE COPY
Attest: Ann A. Birch Clerk
By: /s/ Novell J. Brockington
Deputy Clerk

Sexual Harassment and Sexually Hostile Environment

Page(Re Talk With Plant Doctor) (264-15): "I reported to him that I had been sexually assaulted...[that] I was under a lot of stress and I didn't know how I was going to be able to deal with the situation. He told me, 'You know, you're a woman working in a man's environment. This is the type things that happen when you put yourself in this position.' I said, 'But nothing, when they hire you, tells you you've got to be subjected to sexual abuse.' He says, 'Well, you know, if you can't handle the pressure, then you need to get another job.' I told him, I said, 'Well, you know, I just don't feel like that. I feel like I've got a right to work out here just like anybody else does, without being subjected to sexual abuse, and I feel like the company is responsible for doing something about it.' He says, 'Well, do you want me to examine your breast?' I says, 'No, if you feel that way. I don't want you to examine me for anything.'"

Notes of Dr. William Early, Plant Doctor, (P's Ex. 97, 2026):
"Carole Page saw me in the medical dept. at 0845 on 8-3-84. Her chief complaint was to tell me that she had been sexually assaulted... She that that (sic) while she was alone at her station in the Cronar plant on Monday night 7-30-84 a male employee came up behind her, reached around and grabbed her breast and pushed

on her. She said she hit him in the ribs with her elbow and reached for the telephone to call her supervisor. ...She said she was being humiliated because of this alleged attack and now 'people' were talking about her.
"She just told me...some man from behind her put his hands on her breasts or something, and bumped her in the back, and she did like that [indicating], and that was the end of that. ...I thought it was a very trivial incident. Q. Did you and she have a discussion about that, about whether she thought it was a trivial incident or not? A. Our only discussion was that I thought it was a very trivial incident." (Tr. 765)

Q. "In what way did you think that was trivial, Dr. Early?
A. There was no damage done to her. I shouldn't say this -- I say went so far and said, 'Did you actually see a man's penis?' She said, 'No'. I said, 'to me, that's not a sexual assault.'"

Tim Williams, "B" Shift Supervisor, Memorandum to Area Supervisors Steve Love and Robert Patterson, Area Supervisor, August 4, 1984 (P's Ex 62, 1950):

> "Sat. Aug. 4, 1984. 5:00 p.m. The tension on the shift this weekend has been the worst I've seen. Four operators have informed us that if they are asked to work with Carole they will file a grievance. They are afraid of working side by side alone

with her. Sat. morn the stitcher operator who usually watches the coating while Carole goes on break, told her that he had all he could do to handle his job and would not be available. We had several coating problems with #1 coater and Melvin had to go in and help. No one else would get involved. Carole came in at 10:00 and asked who we wanted to relieve her, Melvin replied, no one, that if she was needed he would call her in the breakroom. I feel Carole is still trying to weave a trap for the rumor spreading thing."

Tim Williams, Memorandum, August 5, 1984, to Patterson and Love, Area Supervisors, (P's Ex 63, 1955):

"Sunday Aug 5, 1984 4:00 p.m. 'This has been a rough weekend for the whole shift. Morale is 'the pits'. Several operators have come into the office with questions like can the shift return to normal? What are you going to do with Carole? Why can't she be happy for a while? She is nothing but trouble ---etc Carole had to swing gel early this a.m. and she tried to find someone to help. There were no volunteers. She finally had to lie to Jessie and tell him that Melvin told her to tell him to help her."

Steve Love, (Area Supervisor), Memorandum of Williams' reports, August 6, 1984. (P's Ex. 69, 1965):

> "Shift problems. David Knight made a statement that 'they should roll you back. You can't do any class 4 job'. He was frustrated and upon leaving the room he said come on I'll show you how to do the job. She made the statement that she was tired of being harassed over the incident with Cecil (7/31) and that she was coming in to see Terry Baldwin at 800 this morning because he promised her that she would not be harassed and she didn't have to take it. At 10:00 p.m. Melvin assigned Carole and Sherrill Evans to work the rewind job. Sherrill went to Melvin and told him that he did not want to work with her, ...He indicated that he may file a grievance as a result of being assigned to work with her. ...She called the gate house and wanted to find out from the guard when the support team member would be in. She also told Melvin that a Mylar casting or Finishing employee had told her that they understood that she had been placed on probation for lying about the incident. This upset her. ...The shift is under a lot of stress at the time and it appears that the other employees are very concerned about what is happening to the shift morale now. Peer pressure seems to be playing a big role at this time. Carole is getting some verbal abuse over the incident and her non-cooperation with others."

Melvin Elvis ("B" Shift Foreman), Memorandum, August 25, 1984, (P's Ex 72, 1970):

> "John Slaughter talked about the charges that she would make 'Friday' against me, that I had refused to grant her vacation time because it wouldn't look good on her dependability record. He discussed the majority of the shift not wanting to work with her for fear that her mind could snap and one of them be accused of doing anything she could think up. I assured him should anything be said she would have the problem."

Dr. John Denton (Plant Doctor), Memorandum, September 12, 1984, (D's Ex 97, 2025):

> "Carole relates an incident today in which a male employee was to be trained to produce or add the 'gel'. Carole was told that someone else would train him but Carole insisted that it was her job. When he came, there was another employee with him. Carole interpreted this to mean that the male employee was afraid to be alone with her. We discussed the value of her changing shifts but doubt that conditions would improve. She does not look forward to coming to work due to the recent conflicts."

Melvin Elvis, ("B" Shift Foreman) (p. 1825):

> "Q. What did she say about the laughs and barroom jokes about her shift

and the Polymer operators behind her back was about to snap her nerves?

A. She said it was working on her nerves. She did say that.

8-25-84 Memorandum of Melvin Elvis, (B Shift Foreman), P's Ex 73-1972:

"Carole came into the office crying, shouting that I had to do something, she couldn't take it any longer. I tried to calm her down but she was hysterical. When she finally settled down she made accusations about the shift, Polymer operators, Tim and me.

Some were:
Staff wouldn't let her have a long break without calling her at home (4 times this weekend). That Terry and Braxton had begged her to come back to work after 7-30-84 incident. She wished she had not listen.

I had been harassing her about vacation-job Performance-roll back to Class 3 - and the mention of work during her break time. She said I had harassed her about dependability. She had outside help and was told by "Staff" and her outside help she didn't have to put up with it. I told her I wasn't worried about her outside

or inside help but to stop manufacturing lies, if she had a charge against Tim or myself to file a grievance or do what-ever she felt necessary but helpful comments to help her perform her job was not harassment.

...Sherrill Evans could still be charged with something that happened 'a long time ago'. She was fed-up with telling 'Mylar' he wouldn't work with her.

The laughs and 'Bar Room" jokes by the Shift and the Polymer operators behind her back was about to snap her nerves. She didn't think she should have been working yesterday or today with her nerves the way they are. ... That when she enters the break area 'everybody' gets up and leaves. That she wasn't happy knowing that if she got any help I had to force people to work with her.

...I listened and tried to show her the problem began when her attitude changed on 7-30-84. I tried to reason with her - that if she would make an effort to return to the same attitude she had before the shift, Tim and myself wanted to work with her. She said she had not done anything wrong, that the people had changed. She didn't have a problem. the people on the 2nd Floor didn't want women working the 2nd Floor. She was tired of people staring at her.

I tried to get her to help me solve this problem but all she would say was 'you have a problem and I don't know what to do, when you know let me know'.

I spent 2-1/2 hours trying to reason with her asking her to help herself - the shift - Tim and myself. I don't think anything was accomplished. She keeps saying 'they' don't want a woman on this Shift. She left the office and said 'I don't know what to do'.

Stress and Constructive Discharge

Dr. Roseann Hooks, graduate of Medical College of Virginia, (431-10):

"Yes, I believe it was. She had no other stresses to my knowledge, her family life, everything else was stable, except for the work environment.

In Mrs. Page's case, she'd had extensive medical evaluations as far as colonscopy, x-rays, I knew she'd been to Duke, she'd been to a specialist in Florence. They couldn't find any ulcerated colitis or any pathology to explain her chronic diarrhea. But what she did relate to me was that every day she went to work, she had severe abdominal cramps and severe problems with the diarrhea. That when

she was at home on weekends away from that environment, those symptoms abated. It would happen repeatedly again and again. She would tell me this each time she would come to the office to visit. ...I know the first couple of times I saw her after the assault in September, that was what a lot of our conversation was, it wasn't just how often was your diarrhea, but what was going on, and ever since the assault, the work environment was not the same to her. She felt more and more stress, and her diarrhea was worsening at that time." (429-3)

"I first saw her in August, 1984...At that time her main problem was chronic recurring diarrhea. (423-9) She was continued on anti-spasmodics and anxiety agents. ...The next time I saw her was September 8, 1984. At that time she was presenting with a 10-day history of nausea, vomiting, persistent diarrhea, and severe abdominal cramps. ...She had been extremely nervous since (the sexual assault), had just had uncontrollable diarrhea since then...(424-1)"

"The next time was December 19, 1984. Again the same complaint, stomach cramps, weakness, nausea, vomiting, diarrhea, had blacked out twice due to weakness."

"The Witness: The next one was February, 1985. At that time she had flu-like syndrome, and was placed on anti-biotics. ...The next time was March 25, 1985. Complained of leg cramps and also abdominal pain. ... At that point, she had seen Dr. Basily in between times she'd seen me. She had some colonoscopy, and this revealed non-specific colitis. ... At that point, I was very concerned about the chronic nature of her diarrhea and, recommended maybe she needed some further workup for it."

Dr. John Denton, (Plant Doctor) Notes, (P's Ex 97-2016):

"9-12-84 - 1/2 hour discussion of stress and its relationship to physical symptoms eg: colitis & diarrhea. Given booklet on "mental Health". Carole then commented that supervision was trying to prove that she was mentally ill.

"...12-21-84, She has been having severe diarrhea for a month with 4+ stools/day - watery with mucus. Vomiting of Dec 19 and 20. Syncope +2 [twice] on Dec. 18th x 1 on Dec. 19 while at home. ...Carol claims mental stress at work due to harassment re her limited lifting...I need to do pelvic and rectal exam in Jan. Needs interisne rx of nerves and GI Tract."

"...1-31-85 - Diarrhea continues when at work and usually not at home - esp. long breaks."

"...1-31-85, Carole claims continued stress at work that another supervisor on another shift has stated that she would be fired within 2 weeks if she worked on his shift - that he has 'connections' in personnel & medical. This circulated among the operators. Carole states that it is this attitude that causes the stress - diarrhea."

"...3-20-85 - Carole phoned me. Still having much diarrhea."

"...4-9-85 - Carole phoned - worse again with 8 diarrhea stools/day..."

"...4-22-85, Carole phoned: She is having average of 8 watery stools/day, is weak."

"...5-2-85, Still having diarrhea & muscle cramps and weakness due to low serum K."

5-21-85, Carole phoned - will be admitted to Bruce Hosp. for work-up.

"...5-28-85, Carole phoned: In Bruce Hosp."

"...6-10-85, Carole phoned: At Home. Feels weak & has cramps in bowel."

Terry Baldwin, (Personnel Manager):

"A. I believe it was Steve Love and the immediate supervisor, which would have been Melvin [Elvis]. And, Tim [Williams] would have been there [at the staff meeting at which Page was terminated].

Q. And, what were their recommendations?

A. To terminate as a result of a dependability problem.

Q. Was there any discussion about what was causing her poor attendance?

A. ...And, if I remember correctly, there was an awful lot of them spent by the staff going over each and every time, every specific case, the total amount of time that this employee had missed each and every year....

Q. Did anybody discuss the stress factor and its cause?

A. No, sir." (1832-3)

Retaliation and Failure to Intervene Effectively

Robert Patterson (Assistant Area Supervisor):

> "Q. What specifically did you instruct them (Williams and Elvis) to do about the situation? A. Specifically I instructed Mr. Williams and Mr. Elvis to make every attempt to be sensitive to Carole Page, due to the fact that she had been wronged, due to the fact that she was not in any way responsible for the sexual assault, and to attempt to put the incident behind them the best they could, and to get on with making product. Q. Did you tell them how to achieve that goal? A. No, I did not." (p. 1509)

Tim Williams ("B" Shift Supervisor):

> "Q. And she was totally vindicated in the sexual assault incident, wasn't she? A. No. Q. Okay, why wasn't she totally vindicated? A. Well, my understanding of the results from the discussion with my supervisor, it was that there was - Cecil made the advance and there's the question left open of whether or not it was encouraged. Q. All right, and, you said, 'in your discussing with supervision,' who are you referring to? A. Bob Patterson, Steve Love." (1794-25)

> "A. After the Cecil Hooks incident, there was just cause for their concern. ...Yes...I said there was just cause because Cecil had been coerced into the incident and they did not want the problem to come up to them." (1292-14)

Williams:

Q. Did you know who ws right or wrong in the sexual assault incident? A. No. Q. Did supervision ever tell you who was right or wrong? A. No, sir. Q. Did you ever ask supervision? A. No, sir. Q. Who do you understand today was right or wrong? A. I can't answer that question, because I don't know. Q. You didn't ever make a determination in your own mind? A. No, sir."

"...Q. Did any of (your superiors or management associates) ever come to you and say the attitude on this shift is unjustified, go out and - and convert these people and tell 'em to get off of her back? A. That was not the case. Q. Well, did anybody ever ask you to confer - convert the shift to - to change from rejecting her? A. No." (1780-24)

"A. I discussed all the things that happened arcund there with Bob (Patterson) and got his support with the actions we were taking. Q. What did he tell you specifically, how to specifically counter these specific attitudes? A. I don't recall any specifics that he told me to do."

"...<u>It's our policy not to discuss disciplinary action with one employee -- one with another</u>." (Emphasis added) (1200-11)

Robert Patterson, (Assistant Area Supervisor):

"Q. Did you know the cause of her stress? A. No, I did not." (1501-8)

"Q. Then I asked you, (at a pre-trail deposition) 'do you know for a fact that none of the men harassed her after this (July 31, 1984)?' What was your statement? A. My answer at that time was, 'I did not hear of any.'" (1505-2)

"Q. But you didn't tell them to call the men in and lay down the law to them, in effect? A. No, I did not. Q. And you didn't make any specific program outlining a specific program to be followed or carried out in regard to changing the attitude of the men on the shift? A. No. My perception at the time was if we could get it behind us, we were certainly going to be better off." (1509-25)

Tim Williams ("B" Shift Supervisor):

"Q.Do you know of anything else that people above you did to correct the situation other than as you say, leaving it with you and Mr. Elvis? A. It was our job to correct that, yes. Q. So, in effect, you and Mr. Elvis were the persons that had the total contact with the shift workers and with Carole Page in this situation? A. I don't know about the total contact, but we're accountable for that shift's performance. Q. Did you know any time when any of them ever came down and talked

with anybody or intervened in the situation? A. No, sir. I don't recall any." (1310-16)

"Q. (1793-19) But you never went to them and said, 'Straighten out your attitude because its not right, and she's in the right' (about Hooks), did you? A. Their attitude was not wrong. Q. And, you're saying that these ten or eleven employees that didn't want to work with her were not wrong in their attitude? (1793-1) A. After the Cecil Hooks incident, there is - there was justified skepticism on what could happen 'if I brush up against Carole.' Q. When you knew that he (Hooks) had apologized for being wrong? A. Yes. Q. But, you still felt the men were justified in their refusing to work with her. A. Their feelings were justified, yes."
Q. ...you didn't feel it incumbent on you to go and get the facts straight, know what they were so that you could present whoever was right's case to your men and change their attitudes? A. Well, it was not a question of - of right and wrong of the matter, it was a question of addressing the individual's personal concerns. These guys had wives at home who would be upset if somebody reported that they had rubbed up - while working, rubbed up against a female and she charged sexual assault." (1797-3)

Williams: (1294-16)

Q. Did you ever go to the men following the sexual assault and tell them to straighten out their attitude because their attitude was wrong, and not right, that she had been the person assaulted? A. As I said before, I was not going to perpetuate the issue."

"Q. ...Another reason you gave why you didn't go to straighten out their attitude was because their attitude was not wrong. Did you say that? A. I don't believe they had a wrong attitude." (1295-16)

"...I feel (Page) is still trying to weave a trap for the rumor spreading thing..." (1286-23) "A. The disciplinary action and the matters of this case were not discussed with the wageroll. ...Did you ever tell them, though, Mr. Williams, Carole was right, Cecil Hooks was wrong, now you people get back to work? A. No, sir, I didn't." (1287-20, 1288-1)

"The feeling across the shift, across the shift would include B Shift, Cronar, they did not know all the facts and weren't going to be told all the facts by us. Carole had two versions which were reported to me, and I wasn't going to straighten them out. ...I didn't investigate the two versions, so I don't know. ...I really didn't know what the two versions were." (1290-2)

Melvin Elvis (B Shift Foreman)

"Q. Why didn't you explain to people (that Page was right and Hooks was wrong) when they came to you? A. We don't talk about one operator to another. That's not ethical to start with, and we just don't do that. Q. Well, you're talking about the subject with them anyway, aren't you? A. No, ma'm. Q. You're hearing rumors floating around, that everybody is getting afraid to work around Carole Page? A. No, I'm listening to the rumors. I'm not passing judgment on the rumors. There is a difference. Q. But you're also not providing them with the true information, are you? A. I'm not going to, because I don't think it's my job. I don't talk with one operator about another operator...." (1110-13)

"Q....Did you ever go to the men individually and explain to 'em how it had happened? A. No, sir. Q. Why not? A. Because that's - we don't do business that way. We don't talk about other people to other operators. Q. And, you didn't do that even after you say the situation got very bad by August 25, 1984? A. I have not even done it to today's date. ...A. People was just asking questions what happened, they had heard so many different tales, they had heard at least three versions, two from her, is what they are telling me, and they want to know the truth. I refused to talk about it. Q. Why did you do that, sir? A. It's not good business..." (1824-21)

Elvis:

"Q. But you continued to talk with these operators, these men, about this problem. They kept coming to you. You can't say you didn't talk about this one operator to another? A. I didn't discuss that problem, no, ma'am. I never passed judgment on it. Q. Never passed judgment on what? A. On who was right and who was wrong. That wasn't the problem. I wanted to go back to work." (1113-2)

"A. ...I probably spent as much time in the gel coating as she did. Q. Okay. And, what did you say to the men? A. Absolutely nothing regarding her regarding this incident. Q. Did y'all - did you and Personnel and the Plant Manager, anybody, adopt a formal program to correct the situation? A. I didn't. Q. Well, did anybody else advise you to adopt a program? A. As far - not me, no, sir. (1823-20)

"Q. ...Why didn't you tell them Cecil Hooks deliberately grabbed Carole Page's breast. It was a deliberate act, there was no question it was an accident, and you don't have to worry, go work with her? (1112-9) A. ...I don't talk about one operator to another. (Emphasis added) We just don't -- I just don't discuss one's personal problems with another. I ask them to go back to work and work. That's what I mean. That's the only way I do it." (1112-21)

"Q. ...Couldn't you have stopped that hypothetical situation by explaining what happened between Cecil Hooks and Carole Page so nobody would be worried and wondering about it again and again? A. I don't know. Q. You could have taken some leadership position in that, couldn't you? A. I felt like I was taking leadership position not to discuss it." (1113-23)

Tim Williams (B Shift Supervisor):

"Q. Mr. Williams, did you have meetings with Maynard Eaton, Plant Manager, during the fall of 1984 fllowing the sexual assault incident? A.Yes, sir. (1320-3) Q. Did you receive any written instructions or memoranda concerning the situation and the treatment of Carole Page? A. No, sir. Q. Were there any discussions between you and the plant manager about her stress situation? A. He felt as I did, that the systems we had in place were adequate to manage stress, any stress problems. Q. And, so there were no specific instructions or stress management programs or anything of that sort given to you to implement or execute with Carole Page? A. No, Sir." (1319-19)

Terry Baldwin, (Personnel Supervisor):

"Q. Well, did you hear anybody in the meeting Mr. - any of those meetings, Mr. Patterson or anybody communicate the fact that the - nobody would work with her and that morale was the pits? A. There was no justification for those statements. I think we've already supported that those thoughts were primarily Carole's thoughts and not found to be factual." (1838-11)

"A. ...I had three or four different people on there. That would have been general instructions to keep me informed if there were any major problems going on there (on the shift). Q. Were there any major problems? A. I didn't see or hear of any, no." (1835-11)

"...Q. Did you check with supervision - did you check with Mr. Williams, say, 'Mr.Williams, Carole Page is complaining about people shunning her and not working with her'? A. As I stated earlier, my Support Team kept me informed on the situation, and they did not come over and tell me that there were situations that you're alluding to going on. Q. Well, did you see the write-ups that Mr. Williams and - A. No, sir. I didn't see those write-ups. Q. Mr. Elvis? A. I never saw any of those write-ups until the Human Affairs charge."

"Q. But, in any any event, you didn't take hold of any program to - to relieve Ms. Page of stress or harassment? A. I saw no need to do such a thing, no." (1837-8)

"Q. Did any of her supervisors (or Patterson) ever make a request of Personnel that you transfer Ms. Page? A. No, sir." (1831-4)

Larry Graham (Personnel Superintendent):

"MR. COURSON: There's no evidence at all that anyone refused to work with her. A. Yes. I guess that's my problem. I don't know of any people that refused to work with her by my actual knowledge there. Q. And you don't -- Do you know of any complaints by Ms. Page that men were freezing her out and refusing to work with her or to associate with her? A. I didn't know anything about that personally, no sir. Q. Well, did you get any reports to that effect? A. No sir." (1804-20)

88-950

Supreme Court, U.S.
FILED
DEC 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1989

NO._____

CAROLE L. PAGE,

Petitioner,

vs.

E. I. DU PONT DE NEMOURS
AND COMPANY,

Respondent.

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

Richard G. Dusenbury
Dusenbury & Snow, P.A.
Post Office Box 555
Florence, South Carolina 29503
(803) 669-6481

Counsel for Petitioner

December 6, 1988

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Decision of United States Court of Appeals, Fourth Circuit . . .	1
Order of United States District Court for South Carolina, Florence Division, Judge Clyde H. Hamilton	9
Verbatim Excerpts from Lower Court Records	84
Sexual Harassment and Sexually Hostile Environment	84
Stress and Constructive Discharge	91
Retaliation and Failure to Intervene Effectively	96

TABLE OF AUTHORITIES

CASES — Page

Christiansburg Garmet Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2nd, 648 (1978) 82

Glymph v. Spartanburg General Hosp., 783 F.2d 476, (4th Cir. 1986) 82

Henson v. City of Dundee, 682 F.2d 897 903-905 (11th Cir. 1982) 64

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 4,5,63,64,66,69,70,71

Marks v. Prattco, Inc., 607 F.2d 1153, (5th Cir. 1979) 73

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973) 72,74,75,77

McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) 69

Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L.Ed. 2d 49, 106 S.Ct. 2399 (1986) 4,61,62,65

Rabidue v. Osceola Refining Company, 805 F.2d 611, (6th Cir. 1986), cert. denied, 107 S.Ct. 1983 (1987) 64,66

Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985). . . 78,80,81

United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977) 60

STATUTES

Title VII of the Civil Rights Act of 1964 42 U.S.C. Sec. 2000e-2(a)(1) (1982) 2,61

Title VII of the Civil Rights Act 42 U.S.C. Sec. 2000e-3(a) (1982) . . . 3,77

Title VII of the Civil Rights Act 42 U.S.C. Sec. 2000e-5(f)(1) & 3 . . 59,83

Title VII of the Civil Rights Act 42 U.S.C. Sec. 2000e-5(e) 59,83

28 U.S.C. Sec. 1331 59

MISCELLANEOUS

EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R.Sec.1604.11 . . 62

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3754

CAROLE L. PAGE, Plaintiff-Appellant,

v.

E. I. DU PONT DE NEMOURS
AND COMPANY, Defendant-Appellee,

Appeal from the United States District Court for the District of South Carolina, at Florence. Clyde H. Hamilton, District Judge, (CA-86-1432)

Argued: June 6, 1988

Decided: September 7, 1988

Before RUSSELL, ERVIN AND CHAPMAN, Circuit Judges.

Richard Green Dusenbury (DUSENBURY & SNOW, P.A. on brief) for Appellant. Gardner G. Courson (William S. Myers, G. Daniel Ellzey, OGLETREE, DEAKINS, NASH, SMOAK AND STEWART on brief) for Appellee.

PER CURIAM:

The plaintiff-appellant, Carole L. Page, was an employee of the defendant-appellee, E. I. Du Pont DeNemours & Company, Inc., from March 23, 1981 until August 2, 1985. Page has sued Du Pont alleging that she was a victim of sex discrimination while an employee of Du Pont's Florence, S. C. plant. Page alleged below that Du Point violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec 2000e, et seq., in four ways: first, through discriminatory discharge based on Page's sex, in violation of section 703(a)(1);[1] second, through sexual harassment resulting from a sexually hostile work environment in violation of section 703(a)(1); third, through retaliatory discharge in response

---

[1] 42 U.S.C. Sec. 2000e-2(a)(1) (1982).

to Page's filing of a complaint of sexual harassment, in violation of section 704(a);[2] and fourth, through retaliatory discrimination in the form of a sexually hostile work environment, created or tolerated in retaliation for registering a complaint of sexual harassment, also in violation of section 704(a). Du Pont contended, on the other hand, that any hostility Page encountered at work was due not to her sex but to her abrasive personality and that she was ultimately discharged because of excessive absenteeism.

Following a bench trial the district court found against Page on all her causes of action and granted judgment in favor of Du Pont. Page's primary claim was sexual

---

[2] 42 U.S.C. Sec. 2000e-3(a) (1982)

harassment. She based such claim on a sexual advance by her fellow employee, Cecil Hooks, during work hours, and on sexually suggestive graffiti placed in the wall of the ladies' rest facilities in the area where she worked. She seeks to hold the employer responsible for these actions under the doctrine of respondeat superior. The circumstances under which such a claim can be successfully asserted against an employer were stated by us in Katz v. Dole, 709 F.2d 251, 251 (4th Cir. 1983), and later by the Supreme Court in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986)[3].

---

[3] Meritor involved an allegation of unwelcome sexual advances by the complaining employee's supervisor. In this case the offending party was a fellow employee and not Page's supervisor.

The requirements are that knowledge of the alleged incident of sexual impropriety be brought to the attention of the employer and that the employer take action to reprimand the offending employee and to take appropriate steps to prevent a recurrence of the impropriety. Katz, at 256. Turning first to the graffiti incident, Page never brought such incident to the employer's attention, nor is there any evidence the employer knew of the incident. This fact is sufficient to dismiss this claim. Page did, however, bring the improper sexual advances of her fellow employee to the attention of the employer, and the employer promptly investigated the incident, gave the offending employee a formal reprimand, duly recorded the incident on the offending employee's employment record, and warned him of discharge if there were any repitition of the offense. The

employer also called a meeting of the employees in Page's department and severely admonished them all against any improper sexual harassment toward female employees and particularly of Page. There were, according to Page herself, no sexual improprieties by the offending employee or any other male employee after these steps had been taken by the employer. The district judge found that the employer therefore had met its burden under Katz, and Meritor, supra, and dismissed this claim. His decision on this point, based on a careful and detailed review of the evidence, was amply supported by the record and was not clearly erroneous.

Page also alleges that her discharge was in retaliation for the filing of her sexual harassment charge. It was the employer's defense to this claim that Page was discharged not because of her filing of the charge but because of a record of absenteeism extending over several years,

finally culminating at the time of her discharge in 1985, when she had a record of 85.6% absences when she was scheduled to work. Her attendance record at that time had so deteriorated that her continued employment in the department was clearly intolerable. During all the preceding years the employer had made repeated unsuccessful efforts to assist Page in improving her attendance record and condoned her excessive absence until in 1985 when the absences became so excessive. The district court found that Page did not refute this evidence. The district judge accordingly found that Page's discharge was not retaliatory but was reasonably justified by Page's inexcusable attendance record at the time of her discharge. The employer's discharge for absenteeism was accordingly found not to be pretextual. The record amply supports this finding and sustains the dismissal of this cause of action.

The other claims of Page were related to two relatively trivial incidents. The district judge, however, considered these carefully, reviewed painstakingly the evidence, and found that they were without merit. Such findings are amply supported by the record and were not clearly erroneous. We accordingly affirm the judgment herein on the basis of the excellent opinion of the district judge.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

CAROLE L. PAGE,	)	CIVIL ACTION NO. 4:86-1432-15H
Plaintiff,	)	
-vs-	)	ORDER
E.I. DU PONT DE NEMOURS & COMPANY, INC.,	)	FILED SEP - 2, 1987
	)	ANN A. BIRCH, CLERK COLUMBIA, S. C.
Defendant.	)	
	)	ENTERED 9-4-87

Carole L. Page, plaintiff, brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e to 2000e-17, alleging that she was wrongfully discharged from her job at E. I. du Pont de Numours & Company (hereinafter "Du Pont") and that while she was employed there she was subjected to both unlawful retaliation and a sexually

hostile work environment.[1] The matter came on for trial before the court sitting without a jury on March 11, 12, 13, 16, 17, 18, 19, and 20, 1987.

After receiving the testimony, carefully considering the entire record, weighing the credibility of the witnesses, reviewing the exhibits, and studying the applicable law, this court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52, Federal Rules of Civil Procedure. The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

[1] At trial, plaintiff's attorney stated that plaintiff was asserting all three causes of action. (Transcript at 15-16). Although plaintiff may have abandoned her claim for wrongful discharge by not addressing it in her Proposed Revised Findings of Fact and Conclusions of Law, the court will address this cause of action, as well as the other two since the case was tried on all three causes of action.

FINDINGS OF FACT

1. Plaintiff, Carole L. Page, is a forty-four year old white female who resides in Lake View, South Carolina. (Transcript at 22).

2. Du Pont operates a plant in Florence, South Carolina, that manufactures Mylar and Cronar. Mylar and Cronar are polyester film products. (Defendant's Exhibit 1). At all relevant times, DuPont was an employer as defined by 42 U.S.C. Sec. 2000e.

3. Plaintiff was hired by Du Pont on March 23, 1981, and was its employee, as defined by 42 U.S.C. Sec. 2000e, until August 2, 1985. (Plaintiff's Exhibit 99).

4. After orientation, plaintiff began work in the Mylar casting area. (Transcript at 40).

5. On June 22, 1981, plaintiff was transferred to the Cronar area. (Plaintiff's Exhibit 99). After completing training, plaintiff was assigned to "D" shift in Cronar casting. By September,

1981, plaintiff had been upgraded from Class 2 to a Class 3 employee. (Transcript at 40; Plaintiff's Exhibit 99).

The Wheel Room Incident

6. In September, 1981, the Cronar production line at the Du Pont plant in Florence became operational. (Defendant's Exhibit 1).

7. During the start-up procedure, hot polymer was present in the wheel room. The temperature of the polymer was approximately 280 to 285 degrees Centigrade. In addition, the polymer could have gas trapped in it, which would cause it to spray. Therefore, anyone handling the polymer or in the vicinity of the polymer was required to wear protective clothing called a hot suit. (Transcript at 724, 1325).

8. The dangers of the wheel room were explained to plaintiff during her training. (Transcript at 724). During the start-up proecedure, several Du Pont

employees, including plaintiff, entered the wheel room without wearing protective clothing.[2] James V. DeTitta, Jr., the supervisor of plaintiff's shift, removed all persons from the wheel room who were not wearing protective clothing. (Transcript at 727-728, 1326).

9. Plaintiff testified that DeTitta grabbed her on the elbow and physically removed her from the wheel room. (Transcript at 43-44). Plaintiff fruther testified that because she was the only person who was touched, she was sexually discriminated against as well as physically assaulted. (Transcript at 426). Plaintiff protested her treatment in the wheel room. (Transcript at 44, 428). Although DeTitta's actions were motivated entirely by concern for the unprotected

---

[2] Whenever clear and unambiguous reference is possible, Du Pont personnel are identified by only their surnames.

workers' safety, he nevertheless apologized to plaintiff for any touching that may have occurred, and plaintiff accepted his apology. (Transcript at 430, 724-725, 894). Plaintiff was offered a position on another shift, but turned down a transfer in order to remain in a car pool. (Transcript at 45). Although plaintiff believes that the entire chain of events that occurred during her employment at Du Pont was precipitated by the wheel room incident, she was satisfied with the settlement of this matter and with De Titta's apology. (Transcript at 429-430, 488).

10. Although plaintiff testified that her supervision was hostile and unresponsive to her needs following the wheel room incident, DeTitta, her shift supervisor, did not treat her any differently than he treated male employees. (Transcript at 46, 723, 725-726).

11. In January, 1982, plaintiff had her gall bladder removed and missed seven days of work. She was on a lifting restriction, or light duty, for four days after she returned to work. (Transcript at 50, 52; Defendant's Exhibit 9).

12. After plaintiff returned to work and was released from light duty, she was contacted by Carroll Enzor, her shift supervisor, concerning attendance.

(Transcript at 53, 729). According to Du Pont policy, employees are to be at work as scheduled whenever possible. (Transcript at 865, 947, 1319, 1590-1591; Defendant's Exhibit 1). Excessive absenteeism, whether for medical or other reasons, is a ground for termination of employment from Du Pont. (Transcript at 1590-1591; Defendant's Exhibit 1). A hardship, in the form of increased duties and responsibilities, is placed on the remaining employees when one employee is absent from work. (Transcript at 751-752, 805).

13. Following her gall bladder surgery, plaintiff began to make notes concerning events at Du Pont. (Transcript at 55). She noted "anything that [she] thought was worth noting." Id. Plaintiff made these notes in a notebook and carried

the notebook with her. (Transcript at 54-55, 753-754).

14. In March and April, 1982, plaintiff missed eleven full days and three part days of work due to illness. (Defendant's Exhibit 9). Du Pont policy requires employees to keep in contact with their supervision while they are out on disability. (Defendant's Exhibit 1). In general, plaintiff kept in touch with her supervision while she was out on disability. (Transcript at 730). In addition, plaintifff's supervisors called her at home to keep in touch with her and save her long distance telephone charges. (Transcript at 730). Male employees were also telephoned in this fashion. (Transcript at 730-731).

15. During 1982, plaintiff was contacted by her supervision concerning her attendance. These were normal contacts on attendance. (Transcript at 732, 743, 746). These contacts were made

to help plaintiff improve her attendance record, rather than to threaten or harass her. (Transcript at 746).

16. In August, 1982, plaintiff was evaluated at Duke University Hospital for chronic diarrhea. (Defendant's Exhibits 47, 48).

17. Following the evaluation, plaintiff and her doctors thought her diarrhea was cured, but it periodically recurred. (Plaintiff's Exhibits 9, 12).

18. Plaintiff missed additional days from work in September, 1982, due to illness. (Defendant's Exhibit 9).

19. On Friday, October 14, 1982, Bob Patterson, a production supervisor under whom plaintiff worked, talked with Harold Hatfield, a supervisor in the personnel department at Du Pont, concerning a possible leave of absence for plaintiff. (Transcript at 1318, 1320; Plaintiff's Exhibit 9). Bob Patterson thought that plaintiff was probably thinking of being

paid under Du Pont's disability wage plan rather than taking a leave of absence. (Transcript at 1320; Plaintiff's Exhibit 9).

20. The disability wage plan is a Du Point employee benefit plan that protects Du Pont employees against loss of income during periods of justified illness or injury through payment of regular wages during such periods. An employee must have one year of service with Du Pont to be eligible for payment under this plan. After plaintiff had been a Du Pont employee for one year, she was eligible to be paid under the disability wage plan. Plaintiff's illnesses were considered to be legitimate, and she was paid pursuant to the disability wage plan during her absences due to illness. (Transcript at 1320-1321, 1398, 1581, 1591; Defendant's Exhibit 1).

21. On October 20, 1982, Bob Patterson, Steve Love, plaintiff's area

supervisor, and Terry Baldwin, the personnel superintendent, had a meeting and talked about the options available to help improve plaintiff's health. (Transcript at 1322, 1587; Plaintiff's Exhibits 9, 12). The options considered ranged from continuing to pay plaintiff disability wages to terminating plaintiff for unsuitability for industrial type work. All three supervisors agreed that the Du Pont medical staff should be more involved in the handling of plaintiff's situation. (Transcript at 1322; Plaintiff's Exhibits 9, 12).

22. By October 21, 1982, Carroll Enzor had made several contacts with plaintiff concerning attendance. (Transcript at 729). On October 21, 1982, CarrollEnzor, following normal procedues, compiled a record of plaintiff's attendance during 1982, showing who plaintiff's doctors were, what plaintiff's illness

was, and what follow up treatment was planned. He sent this document to Bob Patterson, production supervisor. (Transcript at 729-730, 1318; Defendant's Exhibit 20).

23. Bob Patterson received Enzor's note outlining plaintiff's situation. (Defendant's Exhibit 20; Plaintiff's Exhibits 9, 12). Patterson's notes reflect that Dr. Early, the plant physician, had talked with plaintiff concerning her health problems and their treatment, and that plaintiff had been asked to provide Dr. Early with complete medical reports covering her diagnosis, prognosis, and recommendations. (Plaintiff's Exhibits 9, 12).

24. On October 25, 1982, plaintiff returned to Duke University Hospital for a checkup. (Defendant's Exhibit 9).

25. On October 26, 1982, plaintiff passed out while driving to work and ran her truck into a swamp. (Transcript at

1323; Defendant's Exhibit 64).

26. On November 16, 1982, plaintiff reported to Enzor, her shift supervisor, that she was feeling fine, had no problems, was not under the care of a doctor or a psychiatrist, but did have to return to Duke once a year for a checkup. Enzor wrote a memorandum memorializing this conversation and sent it on to Patterson. (Transcript at 731; Defendant's Exhibit 21).

27. On December 13, 1982, plaintiff was promoted to a Class 4 employee and was assigned to Cronar casting and stretch on "C" shift. (Transcript at 87; Plaintiff's Exhibit 99). However, it was later determined that plaintiff's promotion had been in error, due to a seniority mis-calculation, and therefore, on January 3, 1983, plaintiff was returned to Class 3 status and was transferred back to "D" shift. (Transcript at 88; Plaintiff's Exhibit 99).

28. While plaintiff was on "D" shift in late January, 1983, her mother died. (Transcript at 88). Robert Mack, Bob Patterson, Raleigh Dutton, and the assistant plant manager attended plaintiff's mother's funeral. (Transcript at 91). Plaintiff asked Robert Mack, her shift foreman, for two days' vacation, which he allowed. (Transcript at 91, 897). Plaintiff subsequently contacted Robert Mack and asked for two more days of vacation. Id. Upon learning that plaintiff was sick, however, Mack refused to grant her request for vacation time. He did, however, grant her two additional days of leave with disability pay due to her illness. (Transcript at 897-898; Plaintiff's Exhibit 20; Defendant's Exhibit 57).

29. In early February, 1983, plaintiff was again promoted and became a Class 4 casting operator on "B" shift. (Defendant's Exhibit 4). Plaintiff's

supervisors on this shift were Tim Williams and Melvin Elvis. (Transcript at 92, 946).

30. Plaintiff had worked "B" shift overtime on numerous occasions prior to her assignment to "B" shift and knew the people, the assignments, and the jobs on that shift. (Transcript at 1477). Thus, her supervision felt that an immediate, formal orientation upon her beginning work on "B" shift was not necessary. (Transcript at 1477-1478).

The Staring Incident

31. At 8:00 O'clock A.M., on February 28, 1983, plaintiff reported to Du Pont's medical department complaining of a "funny feeling" and "almost passing out." (Plaintiff's Exhibit 97). In addition to telling the nurse that she was short of breath, plaintiff was pale and had an elevated, irregular pulse. Id. Following the nurse's recommendation, plaintiff contacted her physican. (Transcript at

98; Plaintiff's Exhibit 97). Plaintiff was hospitalized for four days. (Transcript at 99). As a result of this illness and hospitalization, plaintiff missed almost four full days of work. (Defendant's Exhibit 57).

32. Plaintiff testified that Steve Love brought on this illness by staring at her for forty to forty-five minutes. (Transcript at 97). The court, however, finds more credible and believable the testimony of Steve Love that he neither stared at plaintiff nor took any action to threaten or intimidate her. (Transcript at 1477, 1135-1136).

33. On March 19, 1983, Melvin Elvis and Tim Williams met with plaintiff to discuss her attendance at work. (Transcript at 950, 1085; Defendant's Exhibit 39). After this meeting, plaintiff's attitude was good, and her supervision believed that they were going to be able to work with her to improve her atten-

dance. (Transcript at 950). Although putting plaintiff on special review had been discussed among the supervisory personnel, Melvin Elvis and Tim Williams felt that plaintiff's problem with attendance could best be dealt with by less severe measures. Therefore, plaintiff was not placed on special review at this time. (Transcript at 1085, 1351; Defendant's Exhibit 39).

34. Shortly after being transferred to "B" shift, plaintiff was assigned to be a rewinder operator because it was a logical assignment considering her experience and because her supervision felt this job would not generate stress. (Transcript at 1144-1145; Plaintiff's Exhibit 26).

35. In May, 1983, MelvinElvis transferred off "B" shift, and Robert Mack replaced him as plaintiff's foreman. (Transcript at 951).

36. In August, 1983, plaintiff, who

was a Class 4 employee, was offered an opportunity to transfer to a Class 3 job in casting. Plaintiff declined to accept this transfer. (Transcript at 1086-1087, 1332-1333; Defendant's Exhibit 5). Although such a transfer would have meant that plaintiff would have different supervisors, it would have also meant that she would have had to take a reduction to a Class 3 employee, pursuant to Du Pont's seniority system. (Transcript at 1449).

37. On November 8, 1983, plaintiff was injured on the job when a wrench fell on her foot. (Transcript at 111; Plaintiff's Exhibit 97). Dr. Denton, another plant physician, recommended that although plaintiff could perform regular work, she should be shielded from performing excessive walking for approximately one week and kept from lifting, stooping, or straining. (Defendant's Exhibit 98).

The Door Slamming Incident

38. In late November or early

December, 1983, plaintiff had occasion to go to Robert Mack's office seeking help with a job procedure that had recently been changed. (Transcript at 114, 1145). When plaintiff approached the foreman's office, Sherrill Evans, who was one of plaintiff's co-workers, Robert Mack and Tim Williams were sitting in Robert Mack's office talking. (Transcript at 867). When plaintiff asked to speak to Robert Mack privately, Mack rose and suggested that the two of them go next door to Tim Williams' unoccupied office to talk. Id. Just after Mack and plaintiff had left Mack's office, Williams pushed the door to Mack's office closed, and it slammed. (Transcript at 810, 867-868, and 1147). Plaintiff had turned to reenter Mack's office just as the door slammed. (Transcript at 810). Williams, however, could not see her approaching because his back was turned. (Transcript at 810-811).

39. Plaintiff believed that Williams

had intentionally slammed the door "in her face" and complained to Sherrill Evans about the incident. (Transcript at 811). Later in the shift, plaintiff again went to see Mack and complained of Williams' behavior. (Transcript at 868; Plaintiff's Exhibit 22). In the interest of fostering good working relationships among the employees on his shift, Mack assured plaintiff that he would set up an appointment with Williams for the purpose of discussing this incident. (Transcript at 868-869).

40. When Williams reported to work the next day, Mack told him that plaintiff was upset and that he was to talk with her and try to resolve the situation. (Transcript at 869, 1147-1148).

41. After his discussion with Mack, Williams called plaintiff into his office for a talk. (Transcript at 117, 1148). Initially, Williams apologized to plaintiff for slamming the door and

explained that he had just "overpushed" the door. He assured plaintiff that the slamming of the door had not been aimed at her. (Transcript at 1148). After Williams' initial apology, plaintiff broadened the conversation and a discussion covering many aspects of plaintiff's employment ensued. Tempers flared, and, as Williams put it, a two-way loss of control occurred. (Transcript at 1090, 1148). However, after Williams left the room temporarily, things calmed down and a long discussion ensued. The meeting ended on a positive note with both Williams and plaintiff agreeing to try to work together. (Transcript at 118, 1148-1151).

42. In order to keep his supervision informed, Williams composed a memorandum concerning the door slamming incident and the discussion with plaintiff that had followed. (Plaintiff's Exhibit 27). Rough drafts of this memorandum preceded the final copy. (Transcript at 163-164,

1151; Plaintiff's Exhibits 23, 24, 25, and 40).

43. The following morning, Williams telephoned Patterson and told him of the incident. (Transcript at 1092, 1152, and 1338). Patterson made notes concerning this conversation with Williams. (Transcript at 1337, 1339; Plaintiff's Exhibit 26).

44. Patterson called Terry Baldwin of personnel, and the two of them discussed Patterson's conversation with Williams. (Transcript at 1339). Baldwin's advice was that Patterson should have Mack and Williams document what was said and that Mack, Williams, and plaintiff should be brought before Patterson for a discussion. In addition, Baldwin noted that insubordination would not be tolerated. (Transcript at 1339-1340; Plaintiff's Exhibit 26).

45. On December 7, 1983, Patterson had a discussion in his office with

Mack, Williams, and plaintiff. (Transcript at 1340). The top half of Plaintiff's Exhibit 28 reflects Patterson's objectives for that meeting. (Transcript at 1340; Plaintiff's Exhibit 28). Patterson went over each item on Plaintiff's Exhibit 28 with Mack, Williams, and plaintiff. (Transcript at 870). Patterson convened this meeting so he could determine what had, in fact, occurred and could set these three on a path of working together in the future. (Transcript at 1344). The bottom half of Plaintiff's Exhibit 28 reflects Patterson's opinions and summary of this meeting. (Transcript at 1343). He noted that plaintiff did not feel this had been an important incident, but that she understood the items listed on this exhibit. He futher noted that plaintiff said she did not have any problems with Williams or Mack. (Transcript at 1343; Plaintiff's Exhibit 28). Patterson did not threaten to discharge plaintiff or

place her on probation at this meeting. (Transcript at 1343).

46. In December, 1983, plaintiff refused an opportunity to transfer out of Cronar to a Class 3 Mylar casting job. (Transcript at 1344-1345; Defendant's Exhibits 6, 58).

47. Following the door slamming incident, plaintiff mistakenly believed "that supervision was actively after [her] again." Her chronic diarrhea returned. (Transcript at 138).

48. In February, 1984, Mack, plaintiff's foreman on "B" shift, gave plaintiff her annual employee performance review. (Transcript at 875-876; Plaintiff's Exhibit 87). Plaintiff's overall rating was "good". (Plaintiff's Exhibit 87). At that time, plaintiff commented,"I have no complaints about my job or my supervision. I enjoy my work and hope to move to other areas when time permits." (Transcript at 876; Plaintiff's Exhibit 87).

49. In March, 1984, plaintiff experienced problems with her back. She saw Dr. Denton [plant physician] on March 16th and March 26th and was placed on guided work on each of these visits. (Plaintiff's Exhibit 97).

50. On March 28, 1984, plaintiff was sent home by her foreman due to "much pain". (Plaintiff's Exhibit 97).

51. On March 31, 1984, plaintiff underwent ovarian cyst surgery. (Transcript at 139; Plaintiff's Exhibit 97).

52. When a Du Pont employee is out on disability, the employee must notify her immediate supervisor about her status, or the supervisor will contact the employee periodically while she is absent from work. (Transcript at 140).

53. Williams and plaintiff talked on several occasions while plaintiff was out on disability due to her surgery. (Transcript at 1162). Although plaintiff was concerned about her disability record,

Williams assured her that she should follow her doctor's instructions, that she should return to work when her doctor released her, and that they would worry about her attendance problems then. (Transcript at 1162-1163).

54. On April 18, 1984, plaintiff returned to work and received a nominal contact concerning attendance. (Transcript at 141). Plaintiff was placed on guided work for four (4) to six (6) hours a day. (Transcript at 878-879; Plaintiff's Exhibit 97; Defendant's Exhibit 41).

55. As of May 11, 1984, plaintiff was still restricted to not lifting more than forty to forty-five pounds. (Transcript at 1349; Plaintiff's Exhibit 97; Defendant's Exhibit 42, 65). Such a restriction constituted light duty, and would prevent plaintiff from performing all of her normal job duties. (Transcript at 879-880, 1349).

56. During May, 1984, while plaintiff was still on a lifting restriction following her surgery, Mack and Williams discussed the possibility of plaintiff transferring to a job in the control lab in the Mylar division. Plaintiff had expressed an interest in transferring to such a job, and therefore, her supervision looked into the possibility of transfer. Although the idea was presented to higher supervision, plaintiff was not transferred to the lab because no job opening existed there and because Du Pont policy did not allow for such special transfers except in very unusual circumstances. It was felt that plaintiff did not warrant such an exception to the usual seniority transfer system. (Transcript at 877-878, 1096-1097, 1165-1166; Plaintiff's Exhibit 30).

57. On May 21, 22, 23 and 24, 1984, Mack, plaintiff's foreman on "B" shift, made some notes concerning plaintiff's job performance and daily occurrences.

(Plaintiff's Exhibits 32, 33, 34, and 35). Mack made these notes for his own future reference concerning the events and occurrences of these days. He did not discuss all of these events with plaintiff. These notes were not made to harass plaintiff, but simply to document these events and to jog Mack's memory in the event it became necesssary to discuss these events with plaintiff. Mack made similar notes concerning male employees. (Transcript at 881-887).

The Six-Month Attendance Goal

58. On June 4, 1984, Williams and Mack met with plaintiff to discuss a six-month attendance goal with her. Although Williams and Mack intended to help plaintiff by giving her a reasonable and obtainable goal to work toward, plaintiff was resentful and confused about the contact. During the meeting, plaintiff brought out her notebook and began taking down notes. Supervision felt that the

contact was not received as it had been intended. (Transcript at 887-889, 890, 1100-1104, 1170-1177; Plaintiff's Exhibits 38, 39, 41, and 67).

59. On June 8, 1984, Williams made several notes concerning plaintiff, her physical condition, and her work performance. One of these notes reflects that, although plaintiff had seen Dr. Early on May 22nd concerning a stressful work situation, Mack and Williams had not been contacted concerning this situation. (Plaintiff's Exhibit 43). Williams' notes also reflect that plaintiff had "pulled her back" lifting something on June 6, 1984, and that Dr. Denton had decreased her lifting ability to twenty-five pounds and continued her on light duty. (Plaintiff's Exhibits 43, 44). Another one of Williams' notes of June 8, 1984, reflects that although plaintiff was complaining that she was not receiving assistance in performing her job, the job she was

performing was designed to be a one-person job with only occasional assistance necessary and that plaintiff was receiving this occasional assistance. (Transcript at 1107; Plaintiff's Exhibit 68). This note also reflects Williams' opinion that plaintiff's attitude and job performance were completely unsatisfactory on June 8, 1984. (Plaintiff's Exhibit 68).

60. Plaintiff was on light duty from June 8 to June 18, 1984. During this time, she was not to lift greater than twenty-five pounds. On June 18, 1984, Dr. Denton cleared her for regular work, with the restriction that she not work overtime for two (2) weeks. (Plaintiff's Exhibit 97; Defendant's Exhibit 99).

61. On June 10, 1984, Williams noted that plaintiff, who was still on light duty, was complaining of an upset stomach and had performed very little work that day, having stayed in the break room most of the time. (Transcript at 163, 1106; Plaintiff's Exhibit 42).

62. On June 11, 1984, Melvin Elvis replaced Robert Mack as plaintiff's foreman on "B" shift. (Transcript at 951, 1108, and 1191).

63. On June 18, 1984, Elvis, who was now plaintiff's foreman on "B" shift, noticed that plaintiff was taking excessive breaks away from her job. Following his usual practice, he made himself a note that he had contacted plaintiff regarding this problem. (Transcript at 952, Plaintiff's Exhibit 66).

The Special Review

64. Shortly after coming to "B" shift, Elvis assembled and reviewed plaintiff's attendance records. (Transcript at 954). After conferring with his supervisors, a decision was reached to place plaintiff on special review concerning her attendance. Id. Special review is intended to make an employee aware of supervisions' concerns and to

notify the employee of the conduct needed to become an acceptable employee. (Transcript at 1574). Elvis assembled plaintiff's attendance records and presented the special review form to plaintiff. (Transcript at 954). This special review overlapped the six-month attendance goal that plaintiff had been presented by Mack and Williams. (Transcript at 954-955). Elvis explained the attendance special review to plaintiff, but plaintiff refused to sign the special review form. (Transcript at 955-956).

65. After it was brought to Elvis' attention that he had put the special review on an outdated form, he rewrote the special review on the correct form and gave plaintiff another opportunity to sign it. (Transcript at 956, 1574). Plaintiff refused to sign it because the special review overlapped with her previously established six-month attendance goal. To accomodate plaintiff, Elvis changed the

date on the special review to reflect the date that plaintiff's six-month attendance goal was begun. Thus, plaintiff would get credit for time without disability that she had accumulated since the six-month attendance goal had begun. (Transcript at 956-957). Plaintiff still refused to sign the form. (Transcript at 957).

66. Later in September, 1984, plaintiff filed a grievance asserting that supervision had not followed the proper procedures in placing her on special review. (Transcript at 1575; Plaintiff's Exhibits 82, 83, and 93).

67. In late September, 1984, Don Bellefeuil, Cronar product superintendent, met with plaintiff to hear her grievance. (Transcript at 1570, 1575).

68. Bellefeuil decided to destroy the special review because plaintiff had already spent approximately five months without further absences, and therefore, he felt that the special review had served

its purpose. In addition, he felt that the special review had not been handled well or expeditiously. Accordingly, on October 3, 1984, Bellefeuil shredded the special review. (Transcript at 231, 1575-1576).

The Touching Incident

69. At approximately 3:00 O'Clock A.M. on the morning of July 31, 1984, Cecil Hooks, one of plaintiff's co-workers, sexually assaulted plaintiff by touching or grabbing her on the breast. (Transcript at 167, 169). This was an unprovoked event. (Transcript at 169).

70. Just after this occurred John Slaughter, another of plaintiff's co-workers, arrived on the scene. Plaintiff told him what had happened, and he advised her to report the incident to supervision. (Transcript at 169-170).

71. Plaintiff then reported the incident to Elvis, although, per his request, she did not tell him the name of

the offending employee. (Transcript at 170; Defendant's Exhibit 26). Plaintiff stressed that she wanted the incident kept confidential. (Transcript at 960-961).

72. Elvis contacted Harold Horton, who evidently was Cecil Hooks' foreman, and asked Horton to talk to plaintiff about the incident. Horton agreed. (Defendant's Exhibits 26, 82).

73. Plaintiff relayed what had happened, including the name of the offending employee, Cecil Hooks, to Horton. Horton promised to talk to Hooks and asked plaintiff if she would like for Hooks to apologize to her. Plaintiff indicated that she would like an apology. (Defendant's Exhibit 82).

74. As a result of Horton's discussion with Hooks, Hooks apologized to plaintiff, and plaintiff accepted his apology. (Defendant's Exhibits 26, 82).

75. Plaintiff contacted both Horton and Elvis prior to the end of the shift

and assured them that the matter had been resolved and had been kept confidential as she had requested. (Defendant's Exhibits 26, 82).

76. Plaintiff, however, became worried that rumors concerning the incident had begun. (Transcript at 172). Plaintiff, therefore, changed her mind about not reporting the incident to others in supervision and personnel. Two things changed plaintiff's mind: (1) Wade Moore, another co-worker, stuck his head into the room where plaintiff was working and grinned, indicating to plaintiff that he knew what had happened; and (2) plaintiff had confided in John Slaughter after the incident and had sought his advice on what action to take. (Transcript at 1357-1358; Defendant's Exhibit 67).

77. Plaintiff, therefore, returned to Du Pont the following morning, with her husband, and reported the incident to higher supervision and personnel. A

meeting among plaintiff, Harold Hatfield, Patterson, and Baldwin ensued in Baldwin's office. Plaintiff was assured that:

(1) The charges were serious & would be investigated.

(2) She had done the proper thing by reporting the incident.

(3) The matter would be handled in a confidential manner.

(4) She would not be harassed for this or any other reason.

(Defendant's Exhibit 67).

78. On August 2, 1984, Carroll Enzor, a member of supervision, advised another female operator who was talking about this incident that "it would be better if she let things blow over [and] did not get involved in it." (Defendant's Exhibit 22).

79. When Elvis learned that plaintiff had gone over his head and reported the incident to his supervision and personnel, after assuring him that the incident had been resolved, he was not pleased. On August 3, 1984, Elvis had a meeting with plaintiff. During this meeting, plaintiff

indicated that she had been satisfied with Elvis' and Horton's handling of the incident. Elvis told plaintiff that rumors were circulating because plaintiff was talking about the incident and that neither he nor Horton had told anyone of it. (Plaintiff's Exhibit 92).

80. On August 3, 1984, Cecil Hooks was placed on probation because of this incident. (Plaintiff's Exhibits 90, 91).

81. Also on August 3, 1984, plaintiff had a meeting with Love and others to follow up on this incident. During this meeting, plaintiff received some good advice. She was told to try to control herself and to ignore any comments that were made to her or to simply walk away. Plaintiff was encouraged to tell supervision about any problems that ensued. Plaintiff was assured that supervision intended to manage the area to the best of their ability to prevent any type of sexual harassment. (Defendant's Exhibit 84).

Events Following the Touching Incident Including the Trash Can Incident

82. Plaintiff did experience some adverse conditions following the sexual assault incident. (Plaintiff's Exhibits 62, 63). However, these adverse conditions were not completely the fault of others. For example, in a memorandum dated August 8, 1984, Love mentioned that plaintiff was getting some verbal abuse not only over the incident but also over her non-cooperation with others. Love also mentioned that Williams and Elvis were spending much time working on the situation and were trying to keep things under control.

83. Other adverse reactions experienced by plaintiff included operators not talking or associating with her. (Plaintiff's Exhibits 70, 85). In addition, plaintiff testified that on August 25, 1984, she discovered some vulgar graffiti directed at her in one of

the women's restrooms at Du Pont. (Transcript at 210-211). Although it seems unusual considering plaintiff's behavior on other occasions, there is no indication in the record that plaintiff ever reported this occurrence to anyone. There is also no evidence in the record concerning who may have authored this graffiti.

84. In August, 1984, plaintiff reported to Elvis that she had not emptied one trash can because it was full of concrete and was too heavy for her. (Transcript at 189-190, 983-984; Plaintiff's Exhibit 77).

85. The following night Elvis checked what he thought was the offending trash can and found it could be lifted easily. (Transcript at 191, 984; Plaintiff's Exhibit 77).

86. Elvis told plaintiff to empty the trash can but to get some help if it was too heavy for her. (Transcript at 984).

87. Plaintiff attempted to empty the trash can without asking anybody to help her. (Transcript at 563).

88. The trash can fell backwards against the plaintiff when she tried to empty it into the dumpster. (Plaintiff's Exhibit 77).

89. The following day, August 26, 1984, plaintiff reported to medical complaining of a bruise on her leg from the trash can incident. Plaintiff was taken to a physician at McLeod Regional Medical Center in Florence, South Carolina. (Plaintiff's Exhibit 77; Defendant's Exhibit 27). The doctor reported that plaintiff needed to stay off her leg for three to five days, but that the bruise was of no great significance. (Defendant's Exhibit 27).

90. Plaintiff, however, continued to exacerbate the situation on her shift. She made comments to other operators to the effect that if anyone ever touched her

again and she was not absolutely sure that it was accidental, "she would have his ass" or get his job. (Transcript at 972, 1116). Plaintiff brought the touching incident up over and over aain. (Transcript at 1198). Plaintiff would not let the touching incident die. (Plaintiff's Exhibit 75).

91. Du Pont, however, did not ignore the situation but took positive steps to improve it. When other operators expressed concerns about working with plaintiff shortly after the incident, Elvis, plaintiff's foreman, responded that although the incident was regrettable, it should be put in the past and that everyone should return to work. (Transcript at 969-970). Elvis asked every man on the shift not to let this incident affect the way the shift worked together. In fact, he demanded it. (Transcript at 784, 834, 973). Elvis took steps to see that plaintiff had adequate help when she

needed it. (Transcript at 894-850; 977-978).

92. Tim Williams, plaintiff's supervisor, also stressed to the other operators that they all had to work together as a team and that it was important that they continue to work wth plaintiff. He asked that they continue working with plaintiff as they had before this touching incident occurred. (Transcript at 814-815, 834, 1114-1115, 1203).

93. Steve Love, the area superintendent, also took steps to remedy the situation. He spoke with Patterson, Elvis, and Williams about their need to treat all of the employees fairly and to get the employees to work together as a team so that everything could return to normal as quickly as possible. (Transcript at 1501.)

94. Patterson, production supervisor, also took steps to see that this situation

was remedied as soon as possible. He gave directions to the shift suprvisor and the foreman that the touching incident had not been plaintiff's fault and that they were to assure her that Du Pont was doing everything it could to see that she was not penalized in any way for the occurrence of this incident. He also made it a point to spend more time in plaintiff's area talking to the employees and trying to handle their concerns about working with plaintiff. (Transcript at 1359, 1361).

95. Plaintiff's supervision also set up meetings between plaintiff and Dr. Denton, a member of the plant's medical staff, for plaintiff to obtain help in relieving her stress. (Plaintiff's Exhibit 80; Defendant's Exhibits 87, 105).

96. On September 14, 1984, another meeting of supervisory personnel was held. Among things stressed at this meeting was that other operators were not to be

allowed to refuse to work with plaintiff on a one-on-one basis. (Plaintiff's Exhibits 81, 108).

Events Leading to Termination

97. Plaintiff was continuing to have problems with chronic diarrhea, and on February 25, 1985, she was sent home by plant medical personnel and hospitalized. (Transcript at 245).

98. Plaintiff remained out on disability until she returned to work and was terminated on August 2, 1985. (Defendant's Exhibit 11).

99. Plaintiff was hospitalized again in May, 1985. (Transcript at 252).

100. While plaintiff was out on disability, she generally kept in touch with Dr. Denton and/or her supervision. (Defendant's Exhibits 28, 29, 30, 70, 71, 72, 73, 74, 75 and 76).

101. A recommendation to terminate plaintiff was first presented to staff on June 23, 1985. Staff is composed of the

plant manager and his superintendents. At the June 23, 1985, staff meeting, Plaintiff's Exhibit 109, which was prepared by Steve Love with input from Melvin Elvis, Tim Williams, Bob Patterson, and Dr. Denton, was presented with the recommendation for termination. Staff determined that three options were available depending on plaintiff's medical condition. If plaintiff remained ill until late August, 1985, her six-month disability wage plan would expire. If this occurred, she would either have to be granted a leave of absence without pay or be terminated while still ill. If, however, prior to the expiration of her disability wage plan, the cause of plaintiff's illness was discovered and she was cured, she could return to work as a cured individual with a good prognosis for availability for work. If, on the other hand, plaintiff was improving but retained a poor prognosis for good health in the

future, she might be terminated if staff concurred in the decision at that time. Accordingly, staff requested Dr. Denton to provide a report on plaintiff's current medical condition. (Transcript at 1506-1509).

102. On June 27, 1985, Dr. Denton opined that plaintiff's problems had a poor prognosis and that, at that time, she was incapable of performing industrial type work. (Defendant's Exhibit 14).

103. Dr. Denton examined plaintiff on July 24, 1985, and determined that plaintiff was able to return to regular work beginning August 2, 1985. (Defendant's Exhibit 15). However, Dr. Denton's long-term prognosis concerning plaintiff's illness did not change. (Transcript at 1286-1287; Defendant's Exhibit 15).

104. On July 30, 1985, staff was informed that although plaintiff had improved and was slated to return to work, she had not been cured and her long-term

prognosis had not changed. Staff concurred in the recommendation for termination. (Transcript at 1510).

105. When plaintiff returned to the plant on August 2, 1985, she was summoned to a meeting with Elvis and Love. They informed plaintiff that she was being terminated because "[she was] unsuited for our type of industrial employment because [she had] not demonstrated the ability to perform [her] regular job assignment for halth reasons and the prognosis does not reflect sustained improvement." (Transcript at 1580-1581; Defendant's Exhibit 31).

106. Elvis' and Love's discussion with plaintiff was calm and without incident. (Defendant's Exhibit 86).

107. At the Du Pont plant in Florence, South Carolina, no employee with as much unavailability for work or undependability as plaintiff has not been terminated. (Transcript at 1613).

108. Code 440 is one of Du Pont's pay codes. According to company policy, it is to be used for diagnostic, observation, and therapy treatment. (Plaintiff's Exhibit 101). Wages paid on Code 440 do not come out of the disability wage account fund. Therefore, when the disability dollars spent per eligible employee is calculated each month, the resulting figure does not reflect disability time covered under Code 440. This figure is used to reflect cost parameters. Code 440 is misunderstood and not consistently administered. Time credited to Code 440 is included when Du Pont calculates an individual employee's accountability or dependability for work. (Transcript at 1393-1399; 1592-1593).

109. Plaintiff was trained to perform her job assignments. She received as much or more training as male employees of Du Pont in Florence. (Transcript at 751, 813, 847).

110. After plaintiff had one year of service with Du Pont, she was eligible for and was paid under the disability wage plan because her illnesses were considered to be legitimate. (Transcript at 1320-1321, 1581, 1591; Defendant's Exhibit 1).

CONCLUSIONS OF LAW

This court has jurisdiction over this matter pursuant to 42 U.S.C. Sec. 2000e-5(f)(1) and (3), and 28 U.S.C. Sec. 1331.

Although it is not contested that plaintiff timely filed the instant action after receiving her "right to sue" letter from the Equal Employment Opportunity Commission (hereinafter the "EEOC", Du Pont asserts that all of plaintiff's allegations concerning events that occurred more than 300 days prior to the filing of Plaintiff's claim with the EEOC on November 19, 1985, are time-barred. 42 U.S.C. Sec. 2000e-5(e).

Plaintiff was discharged from Du Pont on August 2, 1985. Plaintiff alleges that

this discharge was wrongful and retaliatory. In addition, plaintiff alleges that her termination was the culmination of a sexually hostile work environment that had persisted for some time.

Although the events plaintiff complains of that occurred more than 300 days prior to the filing of her EEOC charge are not separately actionable, they do constitute relevant background evidence in a proceeding challenging a current practice. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977). Plaintiff's termination, which is alleged to have been discriminatory, occurred within the 300-day period. Moreover, plaintiff alleges that the sexually hostile work environment continued to and resulted in this termination. Plaintiff is challenging events that occurred during the 300-day period, and therefore, prior events constitute relevant background evidence concerning the validity of

plaintiff's claims.

In one of her causes of action, plaintiff asserts that she was subjeted to a sexually hostile work environment in violation of 42 U.S.C. Sec. 2000e-2(a)(1). This statute provides that:

> [i]t shall be an unlawful employment practice for an employer...to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. ...

42 U.S.C. Sec. 2000e-2(a)(1).

The Supreme Court recently recognized that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. Meritor Savings Bank v. Vinson, 477 U.S. _____, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). However, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of

[the victim's] employment and create an abusive working environment.'" Meritor, 106 S.Ct. at 2406 (citation omitted).

In holding that a cause of action for hostile environment sexual harassment exists, the Supreme Court relied, in part, on the EEOC's Guidelines on Discrimination Because of Sex. 29 C.F.R. Sec. 1604.11. This regulation provides, in pertinent part, that:

> [h]arassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. ...
>
> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. Sec. 1604.11(a) and (b).

In Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), the Fourth Circuit posited a two step analysis of the order of proof in a sexual harassment claim:

> First, the plaintiff must make a prima facie showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.

Katz, 709 F.2d at 256.

Other circuits have described the order of proof of a sexually hostile work environment claim rather differently and have required plaintiffs to allege and prove a number of elements. These elements are:

(1) [that] [t]he employee belongs to a protected group;

(2) [that] [t]he employee was subject to unwelcome sexual harassment;

(3) [that] [t]he harassment complained of was based upon sex;

(4) [that] [t]he harassment complained of affected a "'term, condition, or privilege'" of employment; [and]

(5) [r]espondeat superior.

Henson v. City of Dundee, 682 F.2d 897, 903-905 (11th Cir. 1982); See also Rabidue v. Osceola Refining Company, 805 F.2d 611, 619-620 (6th Cir. 1986), cert. denied, 55 U.S.L.W. 3746 (U.S. May 5, 1987) (No. 86-1472).

While acknowledging the manner in which other circuits analyze claims of sexually hostile working environments, this court elects to follow the order of proof approved by the Fourth Circuit in Katz. Katz, 709 F.2d at 255-256.

Accordingly, plaintiff is first required to make a prima facie showing that sexually harassing actions took place. Katz, 709 F.2d at 256. If this is done, Du Pont may rebut the showing either directly, by proving that the events did

not take place, or indirectly, by showing that they were isolated or genuinely trivial. Id.

Plaintiff has clearly shown that two sexually harassing events occurred during her employment at Du Pont: the Cecil Hooks touching incident and the sexually explicit graffiti incident. See Findings of Fact 69, 83. However, it is clear that these two incidents, in and of themselves, cannot support a claim of a sexually hostile work environment. As the Supreme Court noted in Meritor, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor, 106 S.Ct. at 2406 (citation omitted).

> Furthermore, [u]nlike quid pro quo sexual harassment which may evolve from a single incident, sexually hostile or intimidating environments are characterized by multiple and varied combinations and frequencies of offensive exposures, which characteristics would dictate an order of proof that placed

> the burden upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency.

Rabidue, 805 F.2d at 620.

Thus, standing alone, these two isolated events do not satisfy the first step in the order of proof of a claim for a sexually hostile work environment. Katz, 709 F.2d at 256.

Plaintiff, however, complains of other work place incidents, asserting that these actions also constitute "sexual harassment". The incidents complained of, inter alia, include repeated contacts by supervision over attendance, misuse of Code 440 by supervision, a lack of training by supervision, as well as the wheel room incident, the staring incident, and the door slamming incident.

The court finds, however, that plaintiff has greatly overexaggerated or misconstrued these and other alleged incidents or occurrences. For example,

plaintiff's contacts on attendance were not intended to harass or intimidate her, but to help her improve her attendance record. See Findings of Fact 14-15, 33, 52-54, 58, and 64. The six-month attendance goal and the thwarted special review were also intended to help plaintiff improve her attendance record. See Findings of Fact 58-68. Furthermore, plaintiff received as much or more training as her male counterparts. See Findings of Fact 30, 109.

In addition, Code 440 was not used to harass or discriminate against plaintiff. Admittedly, Code 440 was not uniformly administered. See Finding of Fact 108. However, variations in the use of Code 440 resulted from confusion among supervision and not from a desire to harass or discriminate against plaintiff. See Finding of Fact 108. Time missed from work and listed as Code 440 is included when a Du Pont employee's dependability is

calculated. Therefore, the misuse or nonuse of Code 440 had no bearing on the ultimate determination that plaintiff was undependable. See Finding of Fact 108.

The court also believes that plaintiff misconstrued, misinterpreted, or over-reacted to the actions of her supervision during the wheel room incident and the door slamming incident. DeTitta's actions in the wheel room were motivated entirely out of concern for plaintiff's safety, and that of other employees treated similarly. See Finding of Fact 9. Everyone that did not have on a hot suit was removed from the wheel room by DeTitta. See Finding of Fact 8. Any touching that occurred between DeTitta and plaintiff was not intended to harass or discriminate against her. See Findings of Fact 9, 10.

Likewise, the door slamming incident was not intended to harass plaintiff. See Findings of Fact 38, 41. Tim Williams' slamming of the door was unintentional.

See Finding of Fact 41. Furthermore, the court finds that Steve Love never stared at plaintiff for forty-five minutes nor was he responsible for her illness of February 28, 1983. See Finding of Fact 32.

Even if all of the incidents plaintiff describes were deemed to have occurred as she alleges, they would still have to be found to be sexually harassing before plaintiff could satisfy the first element of her burden of proof. Katz, 709 F.2d at 256. In other words, plaintiff would have to show that, but for her sex, the alleged harassment would not have occurred. McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985). Besides plaintiff's allegations that women were not wanted or welcomed at Du Pont, there is no persuasive evidence that any of these alleged incidents occurred because plaintiff was a female. Even assuming, arguendo, that these events occurred as plaintiff contends, they occurred because plaintiff

mistrusted supervision, had difficulty dealing with people, and threatened and intimidated her co-workers. See Findings of Fact 13, 82, 90. Plaintiff has failed to show that any of these incidents occurred because of her sex. Accordingly, the court finds that plaintiff has not satisfied the first step of the Katz analysis.

However, even if plaintiff had made a prima facie showing satisfying the first step of the Katz analysis, Du Pont would still be entitled to prevail because plaintiff has also failed to prove the existence of the second step of the Katz analysis. The only "sexual" harassment that plaintiff has shown consists of the Cecil Hooks touching incident and the restroom graffiti incident. It is abundantly clear that Du Pont took "prompt remedial action rasonably calculated to end [any] harassment" that occurred following the Cecil Hooks touching

incident. Katz, 709 F.2d at 256; See Findings of Fact 77, 78, 81, 91-96. Even though plaintiff's obsession with the touching incident contributed in large measure to an attitude of distrust among her co-workers, Du Pont emphasized that plaintiff's co-workers had to work in harmony with plaintiff. See Findings of Fact 91-94, 96. Furthermore, plaintiff never made any showing that Du Pont knew or should have known of the graffiti incident. Katz, 709 F.2d at 256; See Finding of Fact 83. Thus, even if plaintiff could satisfy the first step of the Katz analysis, her cause of action for a sexually hostile work environment would still ultimately fail.

The plaintiff, however, has also asserted a Title VII cause of action for wrongful discharge. In a cause of action for wrongful discharge, the plaintiff has the burden of initially proving by the preponderance of the evidence a prima

facie case of discrimination. If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Then, should the defendant carry this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

In order to make out a prima facie case of discrimination, a plaintiff must show (1) that she is a member of a protected minority; (2) that she was qualified for the job from which she was discharged; (3) that she was discharged; and (4) after she was discharged her employer filled her

position with a nonminority.[3] Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979). The evidence at trial established that plaintiff was, in fact, a member of a protected minority and that she was discharged. See Findings of Fact 1, 105.

However, plaintiff has failed to establish that she was, in fact, qualified for the job from which she was discharged. Although plaintiff performed her job adequately when she was present at work, she was ultimately discharged for unsuitability for industrial type work due to excessive absenteeism. See Findings of Fact 48, 105.

DuPont policy requires employees to be at work whenever possible. See Finding of

---

[3] In the instant case, plaintiff will not be required to make a showing that her position was filled with a nonminority, since Du Pont, due to staff reductions, has not filled plaintiff's position. (Transcript at 1646-1647).

Fact 12. Excessive absenteeism, whether for medical or other reasons, is a ground for termination of employment from Du Pont. Id. A hardship, in the form of increased duties and responsibilities, is placed on the remaining employees when one employee is absent from work. Id. At Du Pont in Florence, no employee with as much unavailability for work or undependability as plaintiff has not been terminated. See Finding of Fact 107. Thus, due to her excessive absenteeism, plaintiff was not available, and was accordingly not qualified, to perform her job at Du Pont. Plaintiff has, therefore, failed to establish a prima facie case of wrongful discharge.

Assuming, arguendo, that plaintiff had established a prima facie case of discrimination, the burden would shift to Du Pont to articulate some legitimate, nondiscriminatory reason for plaintiff's discharge. McDonnell Douglas, 93 S.Ct. at

1824. Du Pont discharged plaintiff because she was unsuited for industrial employment. Du Pont reached this conclusion because plaintiff had not demonstrated the ability to perform her job due to health reasons and because plaintiff's prognosis did not reflect sustained improvement. See Findings of Fact 101-105. Du Pont's explanation of plaintiff's termination suffices to meet its burden at this stage.

Thus, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 93 S.Ct. at 1826.

Plaintiff alleges that her health problems, and thus her absences, were caused by Du Pont's sexual discrimination. Therefore, plaintiff alleges that because Du Pont itself was responsible for her

absenteeism, her discharge was pretextual.

Plaintiff, however, has not met her burden of showing that her discharge was a pretext for discrimination or that she was, in fact, subjected to sexual discrimination at Du Pont. Plaintiff was discharged for unsuitability for industrial type work because of excessive absenteeism that had a poor prognosis for improvement. See Findings of Fact 101-105. Every employee at the Du Pont plant in Florence with as much unavailability for work as plaintiff has been terminated. See Finding of Fact 107. Moreover, Du Pont tried to help plaintiff improve her health and her attendance record. See Findings of Fact 14-15, 21-22, 33, 53-54, 58, 64, 95. Furthermore, Du Pont would not have terminated plaintiff if she had been cured and had a good prognosis for future dependability. See Finding of Fact 101. Finally, Du Pont made it clear that, rather than support and foster dis-

crimination as plaintiff claims, it would not tolerate any mistreatment or differential treatment of plaintiff. See Findings of Fact 77, 81, 91-94, 96. Accordingly, the court finds that plaintiff was discharged for legitimate, nondiscriminatory reasons that were not pretextual and therefore that her cause of action for wrongful discharge must fail.

Plaintiff has also brought a cause of action for unlawful retaliation pursuant to 42 U.S.C. Sec. 2000e-3(a). This statute provides in pertinent part that:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter ....

42 U.S.C. Sec. 2000e-3(a).

The sequence of proof previously described as being required by McDonnell Douglas is applicable to retaliation cases

as well. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).

Thus,

> [t]he employee is initially required to establish a prima facie case of retaliation by a preponderance of the evidence. Such a prima facie case consists of three elements: 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action.

Ross, 759 F.2d at 365.

It is undisputed that plaintiff, by making various complaints, including her complaint concerning the Cecil Hooks' touching incident, engaged in activity protected by Title VII. It is also undisputed that adverse employment action was taken against plaintiff since she was, in fact, terminated. Plaintiff's difficulties begin, however, on the third requirement for a prima facie case of retaliation.

Although plaintiff seeks to prove that her protected activity gave rise to her

harassment and ultimately, to her termination, she has failed to establish the required causal link between these events. Rather than foster retaliation against plaintiff, Du Pont took positive steps to remedy the admittedly difficult situation between plaintiff and her co-workers. See Findings of Fact 77-78, 81, 91-96. Furthermore, this difficult situation between plaintiff and her co-workers was not initiated by plaintiff engaging in protected activity, but by her persistence in bringing up the incident and by her threats against co-workers and their jobs. See Findings of fact 82, 90. Plaintiff's contacts on attendance were normal and designed to help, not hinder or harass, plaintiff. See Findings of Fact 14-15, 33, 52-54, 58, and 64. Moreover, Code 440 was not used to retaliate against plaintiff. See Finding of Fact 108. Although plaintiff claims supervision retaliated against her by failing to train

her, plaintiff received the same amount or more training than her co-workers. See Findings of Fact 30, 109. In sum, plaintiff has simply failed to establish the existence of a causal link between her engagement in protected activities and any adverse employment action taken against her.

Even if plaintiff were deemed to have met her burden of establishing a prima facie case of discrimination, she would still not be entitled to prevail on this cause of action. If plaintiff presented a prima facie case, Du Pont would then have the burden of producing a legitimate nondiscriminatory reason for the adverse employment action in order to rebut the presumption of retaliation raised by plaintiff's prima facie case. Ross, 759 F.2d at 365. Du Pont has done this by explaining that plaintiff was discharged for unsuitability for industrial type work because of excessive absenteeism with no

prognosis for improvement. See Findings of Fact 101-105. The burden would then shift back to plaintiff to prove retaliation by demonstrating that Du Pont's explanation is pretextual. Ross, 759 F.2d at 365.

There is simply no persuasive evidence that Du Pont's stated reason for terminating plaintiff is actually a pretext for retaliation. As previously stated, rather than retaliate against plaintiff, Du Pont took remedial action to end the unpleasant situation between plaintiff and her co-workers. See Findings of Fact 77-78, 81, 91-96. Du Pont let it be known, both to plaintiff and her co-workers, that plaintiff was not to be harassed, but was to be treated like any other employee. See Findings of Fact 77, 81, 91-94, 96. Such actions and attitudes on Du Pont's part fly in the face of a finding that Du Pont was engaging in retaliation against the plaintiff. Therefore, even if

plaintiff was found to have established a prima facie case of discrimination, her cause of action for retaliation would ultimately fail.

Based on the forgoing Findings of Fact and Conclusions of Law, the plaintiff's claims that she was discriminated against on the basis of her sex must be rejected and defendant is entitled to judgment in its favor.

The court cannot conclude that plaintiff's claims were "frivolous, unreasonable and without merit" so as to entitle defendant to an award of attorney's fees. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). See also Glymph v. Spartanburg General Hosp., 783 F.2d 476 (4th Cir. 1986). Accordingly, the court, in its discretion, declines to award attorney's fees to the defendant as part

of its recoverable costs. 42 U.S.C. Section 2000e-5.

IT IS SO ORDERED at Columbia, South Carolina, this 2nd day of September, 1987.

/s/ Clyde H. Hamilton
Clyde H. Hamilton
UNITED STATES DISTRICT JUDGE

A TRUE COPY
Attest: Ann A. Birch Clerk
By: /s/ Novell J. Brockington
Deputy Clerk

Sexual Harassment and Sexually Hostile Environment

Page(Re Talk With Plant Doctor) (264-15): "I reported to him that I had been sexually assaulted...[that] I was under a lot of stress and I didn't know how I was going to be able to deal with the situation. He told me, 'You know, you're a woman working in a man's environment. This is the type things that happen when you put yourself in this position.' I said, 'But nothing, when they hire you, tells you you've got to be subjected to sexual abuse.' He says, 'Well, you know, if you can't handle the pressure, then you need to get another job.' I told him, I said, 'Well, you know, I just don't feel like that. I feel like I've got a right to work out here just like anybody else does, without being subjected to sexual abuse, and I feel like the company is responsible for doing something about it.' He says, 'Well, do you want me to examine your breast?' I says, 'No, if you feel that way. I don't want you to examine me for anything.'"

Notes of Dr. William Early, Plant Doctor, (P's Ex. 97, 2026):
"Carole Page saw me in the medical dept. at 0845 on 8-3-84. Her chief complaint was to tell me that she had been sexually assaulted... She that that (sic) while she was alone at her station in the Cronar plant on Monday night 7-30-84 a male employee came up behind her, reached around and grabbed her breast and pushed

on her. She said she hit him in the ribs with her elbow and reached for the telephone to call her supervisor. ...She said she was being humiliated because of this alleged attack and now 'people' were talking about her.
"She just told me...some man from behind her put his hands on her breasts or something, and bumped her in the back, and she did like that [indicating], and that was the end of that. ...I thought it was a very trivial incident. Q. Did you and she have a discussion about that, about whether she thought it was a trivial incident or not? A. Our only discussion was that I thought it was a very trivial incident." (Tr. 765)

Q. "In what way did you think that was trivial, Dr. Early?
A. There was no damage done to her. I shouldn't say this -- I say went so far and said, 'Did you actually see a man's penis?' She said, 'No'. I said, 'to me, that's not a sexual assault.'"

Tim Williams, "B" Shift Supervisor, Memorandum to Area Supervisors Steve Love and Robert Patterson, Area Supervisor, August 4, 1984 (P's Ex 62, 1950):

> "Sat. Aug. 4, 1984. 5:00 p.m. The tension on the shift this weekend has been the worst I've seen. Four operators have informed us that if they are asked to work with Carole they will file a grievance. They are afraid of working side by side alone

with her. Sat. morn the stitcher operator who usually watches the coating while Carole goes on break, told her that he had all he could do to handle his job and would not be available. We had several coating problems with #1 coater and Melvin had to go in and help. No one else would get involved. Carole came in at 10:00 and asked who we wanted to relieve her, Melvin replied, no one, that if she was needed he would call her in the breakroom. I feel Carole is still trying to weave a trap for the rumor spreading thing."

Tim Williams, Memorandum, August 5, 1984, to Patterson and Love, Area Supervisors, (P's Ex 63, 1955):

"Sunday Aug 5, 1984 4:00 p.m. 'This has been a rough weekend for the whole shift. Morale is 'the pits'. Several operators have come into the office with questions like can the shift return to normal? What are you going to do with Carole? Why can't she be happy for a while? She is nothing but trouble ---etc Carole had to swing gel early this a.m. and she tried to find someone to help. There were no volunteers. She finally had to lie to Jessie and tell him that Melvin told her to tell him to help her."

Steve Love, (Area Supervisor), Memorandum of Williams' reports, August 6, 1984. (P's Ex. 69, 1965):

> "Shift problems. David Knight made a statement that 'they should roll you back. You can't do any class 4 job'. He was frustrated and upon leaving the room he said come on I'll show you how to do the job. She made the statement that she was tired of being harassed over the incident with Cecil (7/31) and that she was coming in to see Terry Baldwin at 800 this morning because he promised her that she would not be harassed and she didn't have to take it. At 10:00 p.m. Melvin assigned Carole and Sherrill Evans to work the rewind job. Sherrill went to Melvin and told him that he did not want to work with her, ...He indicated that he may file a grievance as a result of being assigned to work with her. ...She called the gate house and wanted to find out from the guard when the support team member would be in. She also told Melvin that a Mylar casting or Finishing employee had told her that they understood that she had been placed on probation for lying about the incident. This upset her. ...The shift is under a lot of stress at the time and it appears that the other employees are very concerned about what is happening to the shift morale now. Peer pressure seems to be playing a big role at this time. Carole is getting some verbal abuse over the incident and her non-cooperation with others."

Melvin Elvis ("B" Shift Foreman), Memorandum, August 25, 1984, (P's Ex 72, 1970):

> "John Slaughter talked about the charges that she would make 'Friday' against me, that I had refused to grant her vacation time because it wouldn't look good on her dependability record. He discussed the majority of the shift not wanting to work with her for fear that her mind could snap and one of them be accused of doing anything she could think up. I assured him should anything be said she would have the problem."

Dr. John Denton (Plant Doctor), Memorandum, September 12, 1984, (D's Ex 97, 2025):

> "Carole relates an incident today in which a male employee was to be trained to produce or add the 'gel'. Carole was told that someone else would train him but Carole insisted that it was her job. When he came, there was another employee with him. Carole interpreted this to mean that the male employee was afraid to be alone with her. We discussed the value of her changing shifts but doubt that conditions would improve. She does not look forward to coming to work due to the recent conflicts."

Melvin Elvis, ("B" Shift Foreman) (p. 1825):

> "Q. What did she say about the laughs and barroom jokes about her shift

and the Polymer operators behind her back was about to snap her nerves?

A. She said it was working on her nerves. She did say that.

8-25-84 Memorandum of Melvin Elvis, (B Shift Foreman), P's Ex 73-1972:

"Carole came into the office crying, shouting that I had to do something, she couldn't take it any longer. I tried to calm her down but she was hysterical. When she finally settled down she made accusations about the shift, Polymer operators, Tim and me.

Some were:

Staff wouldn't let her have a long break without calling her at home (4 times this weekend). That Terry and Braxton had begged her to come back to work after 7-30-84 incident. She wished she had not listen.

I had been harassing her about vacation-job Performance-roll back to Class 3 - and the mention of work during her break time. She said I had harassed her about dependability. She had outside help and was told by "Staff" and her outside help she didn't have to put up with it. I told her I wasn't worried about her outside

or inside help but to stop manufacturing lies, if she had a charge against Tim or myself to file a grievance or do what-ever she felt necessary but helpful comments to help her perform her job was not harassment.

...Sherrill Evans could still be charged with something that happened 'a long time ago'. She was fed-up with telling 'Mylar' he wouldn't work with her.

The laughs and 'Bar Room" jokes by the Shift and the Polymer operators behind her back was about to snap her nerves. She didn't think she should have been working yesterday or today with her nerves the way they are. ... That when she enters the break area 'everybody' gets up and leaves. That she wasn't happy knowing that if she got any help I had to force people to work with her.

...I listened and tried to show her the problem began when her attitude changed on 7-30-84. I tried to reason with her - that if she would make an effort to return to the same attitude she had before the shift, Tim and myself wanted to work with her. She said she had not done anything wrong, that the people had changed. She didn't have a problem. the people on the 2nd Floor didn't want women working the 2nd Floor. She was tired of people staring at her.

I tried to get her to help me solve this problem but all she would say was 'you have a problem and I don't know what to do, when you know let me know'.

I spent 2-1/2 hours trying to reason with her asking her to help herself - the shift - Tim and myself. I don't think anything was accomplished. She keeps saying 'they' don't want a woman on this Shift. She left the office and said 'I don't know what to do'.

Stress and Constructive Discharge

Dr. Roseann Hooks,. graduate of Medical College of Virginia, (431-10):

"Yes, I believe it was. She had no other stresses to my knowledge, her family life, everything else was stable, except for the work environment.

In Mrs. Page's case, she'd had extensive medical evaluations as far as colonscopy, x-rays, I knew she'd been to Duke, she'd been to a specialist in Florence. They couldn't find any ulcerated colitis or any pathology to explain her chronic diarrhea. But what she did relate to me was that every day she went to work, she had severe abdominal cramps and severe problems with the diarrhea. That when

she was at home on weekends away from that environment, those symptoms abated. It would happen repeatedly again and again. She would tell me this each time she would come to the office to visit. ...I know the first couple of times I saw her after the assault in September, that was what a lot of our conversation was, it wasn't just how often was your diarrhea, but what was going on, and ever since the assault, the work environment was not the same to her. She felt more and more stress, and her diarrhea was worsening at that time." (429-3)

"I first saw her in August, 1984...At that time her main problem was chronic recurring diarrhea. (423-9) She was continued on anti-spasmodics and anxiety agents. ...The next time I saw her was September 8, 1984. At that time she was presenting with a 10-day history of nausea, vomiting, persistent diarrhea, and severe abdominal cramps. ...She had been extremely nervous since (the sexual assault), had just had uncontrollable diarrhea since then...(424-1)"

"The next time was December 19, 1984. Again the same complaint, stomach cramps, weakness, nausea, vomiting, diarrhea, had blacked out twice due to weakness."

"The Witness: The next one was February, 1985. At that time she had flu-like syndrome, and was placed on anti-biotics. ...The next time was March 25, 1985. Complained of leg cramps and also abdominal pain. ... At that point, she had seen Dr. Basily in between times she'd seen me. She had some colonoscopy, and this revealed non-specific colitis. ... At that point, I was very concerned about the chronic nature of her diarrhea and, recommended maybe she needed some further workup for it."

Dr. John Denton, (Plant Doctor) Notes, (P's Ex 97-2016):

"9-12-84 - 1/2 hour discussion of stress and its relationship to physical symptoms eg: colitis & diarrhea. Given booklet on "mental Health". Carole then commented that supervision was trying to prove that she was mentally ill.

"...12-21-84, She has been having severe diarrhea for a month with 4+ stools/day - watery with mucus. Vomiting of Dec 19 and 20. Syncope +2 [twice] on Dec. 18th x 1 on Dec. 19 while at home. ...Carol claims mental stress at work due to harassment re her limited lifting...I need to do pelvic and rectal exam in Jan. Needs interisne rx of nerves and GI Tract."

"...1-31-85 - Diarrhea continues when at work and usually not at home - esp. long breaks."

"...1-31-85, Carole claims continued stress at work that another supervisor on another shift has stated that she would be fired within 2 weeks if she worked on his shift - that he has 'connections' in personnel & medical. This circulated among the operators. Carole states that it is this attitude that causes the stress - diarrhea."

"...3-20-85 - Carole phoned me. Still having much diarrhea."

"...4-9-85 - Carole phoned - worse again with 8 diarrhea stools/day..."

"...4-22-85, Carole phoned: She is having average of 8 watery stools/day, is weak."

"...5-2-85, Still having diarrhea & muscle cramps and weakness due to low serum K."

5-21-85, Carole phoned - will be admitted to Bruce Hosp. for work-up.

"...5-28-85, Carole phoned: In Bruce Hosp."

"...6-10-85, Carole phoned: At Home. Feels weak & has cramps in bowel."

Terry Baldwin, (Personnel Manager):

"A. I believe it was Steve Love and the immediate supervisor, which would have been Melvin [Elvis]. And, Tim [Williams] would have been there [at the staff meeting at which Page was terminated].

Q. And, what were their recommendations?

A. To terminate as a result of a dependability problem.

Q. Was there any discussion about what was causing her poor attendance?

A. ...And, if I remember correctly, there was an awful lot of them spent by the staff going over each and every time, every specific case, the total amount of time that this employee had missed each and every year....

Q. Did anybody discuss the stress factor and its cause?

A. No, sir." (1832-3)

Retaliation and Failure to Intervene Effectively

Robert Patterson (Assistant Area Supervisor):

> "Q. What specifically did you instruct them (Williams and Elvis) to do about the situation? A. Specifically I instructed Mr. Williams and Mr. Elvis to make every attempt to be sensitive to Carole Page, due to the fact that she had been wronged, due to the fact that she was not in any way responsible for the sexual assault, and to attempt to put the incident behind them the best they could, and to get on with making product. Q. Did you tell them how to achieve that goal? A. No, I did not." (p. 1509)

Tim Williams ("B" Shift Supervisor):

> "Q. And she was totally vindicated in the sexual assault incident, wasn't she? A. No. Q. Okay, why wasn't she totally vindicated? A. Well, my understanding of the results from the discussion with my supervisor, it was that there was - Cecil made the advance and there's the question left open of whether or not it was encouraged. Q. All right, and, you said, 'in your discussing with supervision,' who are you referring to? A. Bob Patterson, Steve Love." (1794-25)

> "A. After the Cecil Hooks incident, there was just cause for their concern. ...Yes...I said there was just cause because Cecil had been coerced into the incident and they did not want the problem to come up to them." (1292-14)

Williams:

Q. Did you know who ws right or wrong in the sexual assault incident? A. No. Q. Did supervision ever tell you who was right or wrong? A. No, sir. Q. Did you ever ask supervision? A. No, sir. Q. Who do you understand today was right or wrong? A. I can't answer that question, because I don't know. Q. You didn't ever make a determination in your own mind? A. No, sir."

"...Q. Did any of (your superiors or management associates) ever come to you and say the attitude on this shift is unjustified, go out and - and convert these people and tell 'em to get off of her back? A. That was not the case. Q. Well, did anybody ever ask you to confer - convert the shift to - to change from rejecting her? A. No." (1780-24)

"A. I discussed all the things that happened around there with Bob (Patterson) and got his support with the actions we were taking. Q. What did he tell you specifically, how to specifically counter these specific attitudes? A. I don't recall any specifics that he told me to do."

"...<u>It's our policy not to discuss disciplinary action with one employee -- one with another</u>." (Emphasis added) (1200-11)

Robert Patterson, (Assistant Area Supervisor):

"Q. Did you know the cause of her stress? A. No, I did not." (1501-8)

"Q. Then I asked you, (at a pre-trail deposition) 'do you know for a fact that none of the men harassed her after this (July 31, 1984)?' What was your statement? A. My answer at that time was, 'I did not hear of any.'" (1505-2)

"Q. But you didn't tell them to call the men in and lay down the law to them, in effect? A. No, I did not. Q. And you didn't make any specific program outlining a specific program to be followed or carried out in regard to changing the attitude of the men on the shift? A. No. My perception at the time was if we could get it behind us, we were certainly going to be better off." (1509-25)

Tim Williams ("B" Shift Supervisor):

"Q.Do you know of anything else that people above you did to correct the situation other than as you say, leaving it with you and Mr. Elvis? A. It was our job to correct that, yes. Q. So, in effect, you and Mr. Elvis were the persons that had the total contact with the shift workers and with Carole Page in this situation? A. I don't know about the total contact, but we're accountable for that shift's performance. Q. Did you know any time when any of them ever came down and talked

with anybody or intervened in the situation? A. No, sir. I don't recall any." (1310-16)

"Q. (1793-19) But you never went to them and said, 'Straighten out your attitude because its not right, and she's in the right' (about Hooks), did you? A. Their attitude was not wrong. Q. And, you're saying that these ten or eleven employees that didn't want to work with her were not wrong in their attitude? (1793-1) A. After the Cecil Hooks incident, there is - there was justified skepticism on what could happen 'if I brush up against Carole.' Q. When you knew that he (Hooks) had apologized for being wrong? A. Yes. Q. But, you still felt the men were justified in their refusing to work with her. A. Their feelings were justified, yes."
Q. ...you didn't feel it incumbent on you to go and get the facts straight, know what they were so that you could present whoever was right's case to your men and change their attitudes? A. Well, it was not a question of - of right and wrong of the matter, it was a question of addressing the individual's personal concerns. These guys had wives at home who would be upset if somebody reported that they had rubbed up - while working, rubbed up against a female and she charged sexual assault." (1797-3)

Williams: (1294-16)

Q. Did you ever go to the men following the sexual assault and tell them to straighten out their attitude because their attitude was wrong, and not right, that she had been the person assaulted? A. As I said before, I was not going to perpetuate the issue."

"Q. ...Another reason you gave why you didn't go to straighten out their attitude was because their attitude was not wrong. Did you say that? A. I don't believe they had a wrong attitude." (1295-16)

"...I feel (Page) is still trying to weave a trap for the rumor spreading thing..." (1286-23) "A. The disciplinary action and the matters of this case were not discussed with the wageroll. ...Did you ever tell them, though, Mr. Williams, Carole was right, Cecil Hooks was wrong, now you people get back to work? A. No, sir, I didn't." (1287-20, 1288-1)

"The feeling across the shift, across the shift would include B Shift, Cronar, they did not know all the facts and weren't going to be told all the facts by us. Carole had two versions which were reported to me, and I wasn't going to straighten them out. ...I didn't investigate the two versions, so I don't know. ...I really didn't know what the two versions were." (1290-2)

Melvin Elvis (B Shift Foreman)

"Q. Why didn't you explain to people (that Page was right and Hooks was wrong) when they came to you? A. We don't talk about one operator to another. That's not ethical to start with, and we just don't do that. Q. Well, you're talking about the subject with them anyway, aren't you? A. No, ma'm. Q. You're hearing rumors floating around, that everybody is getting afraid to work around Carole Page? A. No, I'm listening to the rumors. I'm not passing judgment on the rumors. There is a difference. Q. But you're also not providing them with the true information, are you? A. I'm not going to, because I don't think it's my job. I don't talk with one operator about another operator...." (1110-13)

"Q....Did you ever go to the men individually and explain to 'em how it had happened? A. No, sir. Q. Why not? A. Because that's - we don't do business that way. We don't talk about other people to other operators. Q. And, you didn't do that even after you say the situation got very bad by August 25, 1984? A. I have not even done it to today's date. ...A. People was just asking questions what happened, they had heard so many different tales, they had heard at least three versions, two from her, is what they are telling me, and they want to know the truth. I refused to talk about it. Q. Why did you do that, sir? A. It's not good business..." (1824-21)

Elvis:

"Q. But you continued to talk with these operators, these men, about this problem. They kept coming to you. You can't say you didn't talk about this one operator to another? A. I didn't discuss that problem, no, ma'am. I never passed judgment on it. Q. Never passed judgment on what? A. On who was right and who was wrong. That wasn't the problem. I wanted to go back to work." (1113-2)

"A. ...I probably spent as much time in the gel coating as she did. Q. Okay. And, what did you say to the men? A. Absolutely nothing regarding her regarding this incident. Q. Did y'all - did you and Personnel and the Plant Manager, anybody, adopt a formal program to correct the situation? A. I didn't. Q. Well, did anybody else advise you to adopt a program? A. As far - not me, no, sir. (1823-20)

"Q. ...Why didn't you tell them Cecil Hooks deliberately grabbed Carole Page's breast. It was a deliberate act, there was no question it was an accident, and you don't have to worry, go work with her? (1112-9) A. ...<u>I don't talk about one operator to another</u>. (Emphasis added) We just don't -- I just don't discuss one's personal problems with another. I ask them to go back to work and work. That's what I mean. That's the only way I do it." (1112-21)

"Q. ...Couldn't you have stopped that hypothetical situation by explaining what happened between Cecil Hooks and Carole Page so nobody would be worried and wondering about it again and again? A. I don't know. Q. You could have taken some leadership position in that, couldn't you? A. I felt like I was taking leadership position not to discuss it." (1113-23)

Tim Williams (B Shift Supervisor):

"Q. Mr. Williams, did you have meetings with Maynard Eaton, Plant Manager, during the fall of 1984 fllowing the sexual assault incident? A.Yes, sir. (1320-3) Q. Did you receive any written instructions or memoranda concerning the situation and the treatment of Carole Page? A. No, sir. Q. Were there any discussions between you and the plant manager about her stress situation? A. He felt as I did, that the systems we had in place were adequate to manage stress, any stress problems. Q. And, so there were no specific instructions or stress management programs or anything of that sort given to you to implement or execute with Carole Page? A. No, Sir." (1319-19)

Terry Baldwin, (Personnel Supervisor):

"Q. Well, did you hear anybody in the meeting Mr. - any of those meetings, Mr. Patterson or anybody communicate the fact that the - nobody would work with her and that morale was the pits? A. There was no justification for those statements. I think we've already supported that those thoughts were primarily Carole's thoughts and not found to be factual." (1838-11)

"A. ...I had three or four different people on there. That would have been general instructions to keep me informed if there were any major problems going on there (on the shift). Q. Were there any major problems? A. I didn't see or hear of any, no." (1835-11)

"...Q. Did you check with supervision - did you check with Mr. Williams, say, 'Mr.Williams, Carole Page is complaining about people shunning her and not working with her'? A. As I stated earlier, my Support Team kept me informed on the situation, and they did not come over and tell me that there were situations that you're alluding to going on. Q. Well, did you see the write-ups that Mr. Williams and - A. No, sir. I didn't see those write-ups. Q. Mr. Elvis? A. I never saw any of those write-ups until the Human Affairs charge."

"Q. But, in any any event, you didn't take hold of any program to - to relieve Ms. Page of stress or harassment? A. I saw no need to do such a thing, no." (1837-8)

"Q. Did any of her supervisors (or Patterson) ever make a request of Personnel that you transfer Ms. Page? A. No, sir." (1831-4)

Larry Graham (Personnel Superintendent):

"MR. COURSON: There's no evidence at all that anyone refused to work with her. A. Yes. I guess that's my problem. I don't know of any people that refused to work with her by my actual knowledge there. Q. And you don't -- Do you know of any complaints by Ms. Page that men were freezing her out and refusing to work with her or to associate with her? A. I didn't know anything about that personally; no sir. Q. Well, did you get any reports to that effect? A. No sir." (1804-20)

(3)

Supreme Court, U.S.
FILED
JAN 9 19
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-950

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CAROLE L. PAGE,
Petitioner,

v.

E. I. DU PONT DE NEMOURS & COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

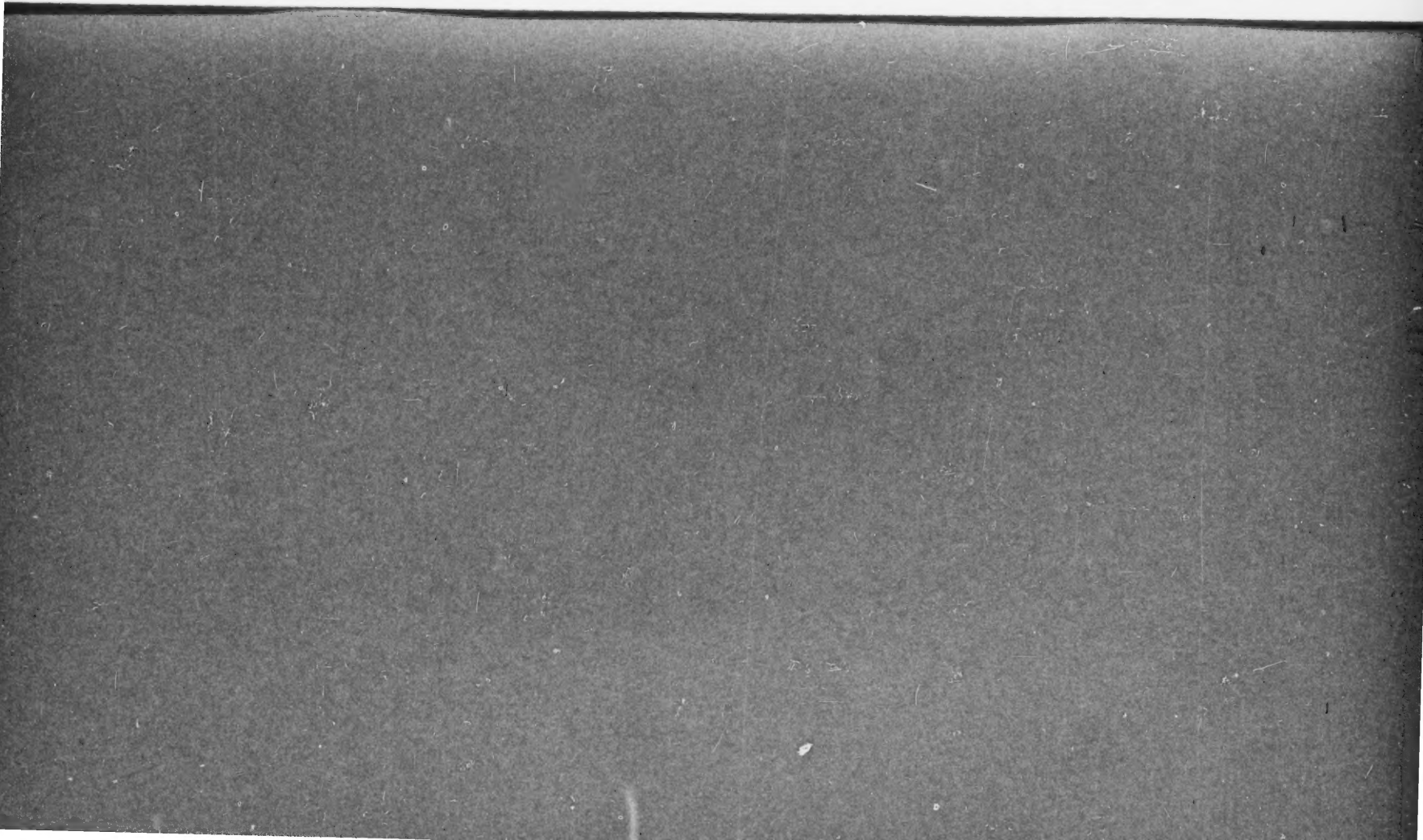
RESPONDENT'S BRIEF IN OPPOSITION

GARDNER G. COURSON *
MARGARET H. CAMPBELL
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
3800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-1300
Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

19pp



QUESTIONS PRESENTED

1. Whether certiorari is warranted for the purpose of reviewing the extensive factual findings of the trial court affirmed by the court of appeals, without an obvious and exceptional showing of error.

2. Whether certiorari is warranted for the purpose of addressing an issue not presented by the record in the case.

LIST OF PARTIES

The following companies are less than wholly owned subsidiaries or affiliates of E. I. du Pont de Nemours & Company, Inc.:

BT&D Technologies; Canadian Harvest; Du Pont Canada Inc.; Du Pont EniChem Gas Piping Systems S.p.A.; Du Pont—Idemitsu Co., Ltd.; Du Pont Lanxide Composites Inc.; Du Pont—MGC Co., Ltd.; Du Pont—MRC Company, Ltd.; Du Pont—Mitsui Fluorochemicals Company, Ltd.; Du Pont—Mitsui Polychemicals Company, Ltd.; Du Pont —Norol Maintenance Services A.S.; Du Pont—Sankyo Pharmaceuticals Co., Ltd.; Du Pont—Showa Denko Co., Ltd.; Du Pont—Toray Company, Ltd.; DuCon; DUSA Endustriyel Iplik Sanagi Ve Ticaret A.S.; DX Imaging; GMT, L. P.; Holland Ethylene Copolymers C.V.; Holland Ethylene Copolymers Management B.V.; IDAC—Automotive Coatings Companies; NIACHLOR; Nypol S.A.; Oncogenetics Partners; Optical Disc Mastering (ODM-VOF); PD Glycol Limited; Philips and Du Pont Optical Company (PDO-US); Philips and Du Pont Optical Company (PDO-NL); PROCOMP; Sclavo S.p.A.; SeparaSystems, Inc.; Societe En Nom Collectif Du Pont de Nemours; Advanced Genetic Sciences, Inc.; Agar Cross; Aldusa S.A.; A.V.R.—Chemie C.V.; A.V.R.—Chemie Bouw B.V.; Avtek Corporation; Biotech Research Laboratories, Inc.; Cine Film Systems; Delaware River Cooperative; Derivados Sinteticos, S.A. de C.V.; DNA Plant Technology Corporation; Dunlena Pty. Limited; Du Pont—TOA Co., Ltd.; Gemeinnutzige Wohnungsbau GmbH; Greyhawk Systems, Inc.; Haemonetics Corporation; HEM Research, Inc.; ImagiTex Incorporated; Industrias Tecnos, S.A. de C.V.; Ingenieurgesellschaft Fur Agragtetechnik und Verkehrsfahrzenge GmbH; La Domincia, S.A. de C.V.; Lanxide Armor Company; Laserscope Corporation; Molecular Biosystems Inc.; Newbridge Networks Corporation; Norcom Du Pont Thermoplastic Composites of Northeast; Nylon de Mexico, S.A.; Per-

ceptive Systems Incorporated; P.T. Peroxida Indonesia Pratama; POC Research Corporation; Quimica Fluor, S.A. de C.V.; Reactivos Minerales Mexicanos S.A. de C.V.; Tetraetilo de Mexico, S.A.; Thapar—Du Pont Limited; Thapar Du Pont Spandex Ltd.; Tintas Renner S.A.; TVS Du Pont Electronics Ltd.; Water Membrane Manufacturing Co., Ltd.

All other parties in this matter are set forth in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
APPLICABLE REGULATORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	
The Petitioner's Request For Factual Review Is Not A Proper Basis For Certiorari	7
The Petition Raises A Question Not Present In This Case	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases Page

Anderson v. Bessemer City, 470 U.S. 564 (1985) 9
Berenyi v. District Director, INS, 385 U.S. 630 (1967) 8
Branti v. Frankel, 445 U.S. 507 (1980) 8
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) 9
Goodman v. Lukens Steel Co., —— U.S. ——, 107 S.Ct. 2617 (1987) 8
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 8, 9
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 10
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 10, 11
McCullough v. Kammerer Corp., 323 U.S. 327 (1945) 10
McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) .. 9, 11
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 9, 10
National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) 8
Needleman v. United States, 362 U.S. 600 (1960) .. 10
Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 1983 (1987) 9, 10
Rogers v. Lodge, 458 U.S. 613 (1982) 8
Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310 (1985) 8
United States v. Ceccolini, 435 U.S. 268 (1978) 8
United States v. Rimer, 220 U.S. 547 (1911) 10

Statutes

42 U.S.C. § 2000e *et seq.* (1964) 1
42 U.S.C. § 2000e-2 (1964) 3
42 U.S.C. § 2000e-3 (1964) 3

Regulations

29 C.F.R. § 1604.11 (1985) 1, 2, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-950

CAROLE L. PAGE,

Petitioner,

v.

E. I. DU PONT DE NEMOURS & COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, E. I. du Pont de Nemours & Company, Inc., opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

APPLICABLE REGULATORY PROVISIONS

In addition to the relevant provisions of Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e *et seq.* (1964)) cited in the petition at pages 2-3, the relevant provisions of the regulations of the Equal Employment Opportunity Commission (EEOC) (29 C.F.R. § 1604.11 (1985)) are as follows:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.
>
> * * * *
>
> (d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents, or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(footnote omitted).

STATEMENT OF THE CASE

The Petitioner Carole L. Page (Page) was employed by the Respondent E. I. du Pont de Nemours & Company, Inc. (Du Pont) at its Florence, South Carolina facility as a Production Operator from March 23, 1981 to August 2, 1985 (All).[1] Page's employment was remarkable for her significant absenteeism for health reasons as well as clashes with supervision and co-workers, all of which began early in her employment.

---

[1] References to the opinions below are designated by "A," followed by the appropriate Appendix page number.

On July 30, 1984, a co-worker touched Page in a sexual manner (A43). Page told another co-worker about the incident and, at his urging, reported the incident to supervision (A43-A44). At Page's request, her supervision confidentially investigated the incident that morning and had the offending co-worker apologize to Page (A44-A45). Page also reported the incident to higher management, who assured Page of a thorough investigation (A45-A46). Pursuant to its established written policy prohibiting sexual harassment, Du Pont placed the offending co-worker on probation, counselled with Page, and informed all of Page's co-workers on several occasions that they were expected to put the incident behind them and work together as a team (A47, A51-A54). Page herself, however, thereafter engaged in antagonistic conduct toward her co-workers, repeatedly raising the touching incident and threatening to have her co-workers fired if they ever touched her and she was not absolutely sure it was accidental (A50-A51).

On August 2, 1985, after a five month absence from work, Du Pont terminated Page on the grounds of her unsuitability for industrial employment, based on her current and projected future inability to perform her regular job assignment for health reasons (A57).

Page filed an administrative charge of discrimination and a subsequent lawsuit on which the present petition is based.[2] Page claimed that she was subjected to a sexually hostile work environment and was terminated because of her sex and in retaliation for complaining about sexual harassment in violation of sections 703 and 704 of Title VII, 42 U.S.C. §§ 2000e-2, 2000e-3 (1964) (A59-A60).

---

[2] It is noteworthy that most of the conduct of which Page complains, including the single, isolated sexual touching, occurred outside the statutory limitations period (A59-A61).

The case was tried for eight days, during which an extensive record of testimony and documentary evidence was compiled. The trial court issued an exhaustive analysis of the case in an order setting forth findings of fact, including credibility determinations, and conclusions of law (A9-A83).

Specifically, the trial court found that only one incident of unwelcome sexual conduct occurred and was reported to management (A71).[3] Du Pont remedied that single, isolated incident quickly, completely, and decisively (A44-A47, A51-A54).

Page also claimed that non-sexual incidents occurred and contributed to the alleged hostile environment sexual harassment. The court found, however, that with respect to absenteeism and treatment by supervisors, Page was not treated differently from similarly situated male employees (A15, A17, A37, A57, A58, A67-A68, A74, A76, A79-A80). The trial court also found that, with respect to other alleged acts, Page "greatly overexaggerated or misconstrued these and other alleged incidents or occurrences," and found further, on the basis of credibility determinations, that some incidents simply did not occur (A66-A69).[4] The trial court additionally found that

---

[3] The Petitioner has argued only selected facts, including those expressly rejected in the factual findings and credibility determinations of the trial court affirmed by the court of appeals. She has also misrepresented record facts. The most serious and material of these misrepresentations is the statement that "Page complained about . . . obscene graffiti in her bathroom." (Petition at p. 17). As counsel for the Petitioner is well aware, the district court found that "there is no indication in the record that plaintiff ever reported this occurrence to anyone." (A48-A49, A71). The court of appeals affirmed this finding (A5).

[4] Although Page would have this Court believe that those alleged acts related to or were precipitated by the sexual touching, the record evidence clearly establishes that most of the alleged acts occurred substantially *before* the touching incident and were unrelated in any way to the incident (A12-A14, A24-A25, A27-A30).

any events which did occur were caused by Page's mistrust of supervision, her difficulty in dealing with people, and the threatening and intimidating conduct which she directed toward her co-workers (A69-A70, A79).

Noteworthy to this proceeding, the trial court specifically found that any alleged harassing conduct did not occur because of Page's sex (A70). To the extent that co-workers were reluctant to work with Page after the incident and such conduct could be considered harassing, the trial court found that Du Pont took "prompt remedial action reasonably calculated to end [any] harassment." (A70-A71).

The trial court also found that Page was not terminated because of her sex or in retaliation for complaining about sexual harassment. Specifically, the trial court found that Page was not qualified for her position because of her excessive abenteeism, and that Du Pont's determination of Page's unsuitability for her position and consistent treatment of similarly situated employees constituted proof of a non-pretextual, legitimate non-discriminatory reason for her termination (A72-A77). With respect to Page's retaliation claim, the trial court found no causal link between Page's complaint and the alleged subsequent harassment or her termination (A78-A79). The trial court also found that Du Pont's conduct in ensuring a non-hostile environment and its legitimate non-discriminatory reason for Page's termination would overcome any inference of retaliation (A80-A82).

The trial court entered judgment in favor of Du Pont on all of Page's claims (A82). Following briefing and oral argument by both parties, the court of appeals affirmed the judgment in all respects (A8).

SUMMARY OF THE ARGUMENT

Page has set forth four "questions presented" in her petition (Petition at pp. i-ii). None of those questions articulates any reason of the character which would warrant this Court's exercise of its discretion to grant a review on writ of certiorari.

Three of the questions Page presents in essence request this Court to conduct a third review of the extensive trial record in this case to try to find proof of actionable sexual harassment and retaliation which the trial court, in its exhaustive analysis, and the court of appeals, on review, could not find. Page's extensive factual arguments and selected lengthy testimony excerpts reveal that her true purpose is only to obtain this factual review. The courts below gave the factual and legal issues in the case full consideration and decided them accurately and fairly. The factual findings and credibility determinations of the trial court, affirmed by the court of appeals as "amply supported by the record and . . . not clearly erroneous" (A6, A7, A8), are entitled to great weight. Page's request for a new review of facts and credibility to resolve specific factual questions which have no significance to any case other than the present case or to anyone other than the parties to the present case, without any obvious and exceptional showing of error, does not present a proper basis for certiorari, and the writ should therefore be denied.

The fourth question stated by the Petitioner purports to raise an issue of the type of evidence which may be considered in determining whether a sexually hostile work environment exists (Petition at p. i, question 1). The question does not state, however, how the issue is raised by the record of the present case. Indeed, the issue is not raised by the record of the present case. The very standard the Petitioner urges should be applied was, in fact, applied by the district court (A69). The court of appeals' decision contained no holding that the district court should have used a more restrictive test;

rather the court of appeals affirmed the district court's factual findings and legal conclusions. The question urged by the Petitioner simply is not presented on the record of the present case, and certiorari should therefore be denied.

ARGUMENT

The Petitioner's Request For Factual Review Is Not A Proper Basis For Certiorari

The district court below conducted an eight day trial during which it observed the demeanor of witnesses, heard testimony, and reviewed voluminous exhibits. After extensive briefing by the parties, and "[a]fter receiving the testimony, carefully considering the entire record, weighing the credibility of the witnesses, reviewing the exhibits, and studying the applicable law," the trial court issued an exhaustive factual and legal analysis of the case (A9-A83). The district court entered judgment in favor of Du Pont on all of Page's claims, finding no proof of actionable hostile environment sexual harassment or retaliation (A83). The trial court's findings were accurate and fair. On review, the court of appeals found the trial court's analysis "careful and detailed," "painstaking[]," even on trivial claims, "amply supported by the record," "not clearly erroneous," and "excellent" (A6-A8). The court of appeals affirmed the judgment in all respects (A8).

Page has asked this Court to grant certiorari to review—for a third time—the extensive trial record to find proof that Page was subjected to a sexually hostile environment and retaliated against after the single, isolated sexual touching, and to find proof that Du Pont did not take remedial action (Petition at p. i, questions 2 and 3).[5] The questions themselves make clear that

---

[5] Page's fourth question, generally alleging "plain error" and summarily briefed, is simply duplicative of her second and third questions urging review of particular factual issues, and makes no specific showing of error (Petition at pp. 60-61).

Page's purpose is to seek a factual review, and her argument reveals that purpose even more clearly. The sections of the petition addressing these questions consist solely of factual recitation and argument, as well as extensive selected quotations of trial testimony (Petition at pp. 37-60). Inasmuch as Page seeks only another factual review of the record to resolve questions already thoroughly and correctly resolved and affirmed and of importance only to the parties in the present case, certiorari should be denied.

This Court has traditionally accorded great weight to the factual findings of a district court approved by a court of appeals. *E.g., National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 n. 15 (1984). Indeed, it is the "settled practice" of this Court to accept factual findings in which both the district court and the court of appeals have concurred, even if they are claimed to be clearly erroneous, except in the "most exceptional circumstances." *Branti v. Frankel*, 445 U.S. 507, 512 n. 6 (1980); *accord, Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). The Supreme Court, as "[a] court of law . . . rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *accord, Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2623 (1987); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n. 5 (1985). Where there are no constitutional issues present and "resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court," there is particular force to the traditional rule of deference. *Berenyi v. District Director, INS*, 385 U.S. 630, 636 (1967); *see*

Anderson v. Bessemer City, 470 U.S. 564 575 (1985) (factual findings entitled to great deference, and findings based on credibility determinations "can virtually never be clear error"). Accordingly, certiorari is "not warranted merely to review the evidence or inferences drawn from it" under such circumstances. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

In the present case the factual findings Page seeks to have this Court review were made by the trial court largely based on credibility determinations. There is ample support in the record for the findings. After careful review and oral argument by both parties, the court of appeals concurred in the findings. There are no constitutional issues. Page has made no "obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. at 275. Accordingly, certiorari is not appropriate and should be denied.

The Petition Raises A Question Not Present In This Case

Page argues intensely in her petition that the courts below erred in holding that hostile environment sexual harassment as recognized in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), may be proved only by sexual incidents, as the Sixth Circuit Court of Appeals held in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 1983 (1987), rather than by sexual and non-sexual incidents, as the District of Columbia Circuit Court of Appeals held in the pre-*Meritor* case, *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985). The record clearly shows, however, that the trial court in fact applied the more liberal *McKinney* standard and considered each alleged incident in determining whether Page proved a claim for hostile environment sexual harassment. The court of appeals affirmed the judgment in all respects. Simply stated, this case does not warrant a grant of

certiorari to resolve this question because the record does not present the question. *United States v. Rimer*, 220 U.S. 547, 548 (1911); *accord, Needleman v. United States*, 362 U.S. 600 (1960); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 329 (1945).

The record of the present case shows clearly that the district court carefully and thoroughly analyzed the facts claimed in support of Page's hostile work environment sexual harassment claims. The trial court began its analysis by defining the cause of action as established by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. at 66-67, and by citing to the EEOC regulations adopted by the Court in that case, 29 C.F.R. § 1604.11 (1985) (A61-A62). The court below continued its analysis by setting forth the two step standard of proof for a hostile work environment sexual harassment claim used by the Fourth Circuit Court of Appeals in *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (A63). The trial court noted that other courts of appeal have required a plaintiff to prove a greater number of specific elements, but rejected that more stringent standard in favor of the *Katz* analysis in the present case (A63-A64, citing *Rabidue v. Osceola Refining Co.*, 805 F.2d at 619-20 and *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)).

The trial court then proceeded to analyze each of Page's allegations under the *Katz* standard, beginning with the allegations of sexual conduct (A65-A66). The trial court found that those allegations did not satisfy the *Katz* standard or the admonition of *Meritor* that the alleged harassment "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." (A65-A66).

Contrary to Page's representation of the record in her petition, the trial court then proceeded to analyze whether the alleged non-sexual workplace incidents, taken together

with the single, isolated reported sexual touching, proved hostile environment sexual harassment (A66-A70). The trial court painstakingly analyzed each of the alleged incidents, based on its findings of fact with respect to each incident, under the very standard Page urges this Court to find that the trial court should have used. As the trial court stated, "plaintiff would have to show that, but for her sex, the alleged harassment would not have occurred." (A69, citing *McKinney v. Dole*, 765 F.2d at 1138). The trial court found that Page had failed to prove that any of the incidents occurred because of her sex (A69-A70). The court proceeded even further to find that even if Page had satisfied the threshold requirement of the *Katz* analysis that sexually harassing incidents had occurred, she failed to prove the second step, that Du Pont failed to take prompt remedial action with respect to the touching incident or the later alleged non-sexual incidents (A70-A71).

At no point in its analysis did the trial court hold that only overtly sexual conduct could be considered in determining whether Page proved hostile environment sexual harassment. In fact, the trial court considered all of the alleged incidents, including specifically the non-sexual incidents, in determining whether Page proved that they occurred because of her sex and, taken together, constituted hostile environment sexual harassment. The court of appeals affirmed the trial court's judgment in all respects, and made no pronouncement that the trial court should have used a stricter standard and considered only overtly sexual acts in determining whether Page had proved her claim. The error Page claims therefore simply is not present on the record.[6]

---

[6] Inasmuch as there is no substantive legal issue raised on the record, it is not appropriate for the Respondent to engage in a discussion in this brief on the type of evidence which will support a finding of hostile environment sexual harassment.

The record is abundantly clear that the issue Page has asked the Court to review is not present on the record. Accordingly, certiorari should be denied.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

GARDNER G. COURSON *
MARGARET H. CAMPBELL
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
3800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-1300
Counsel for Respondent

* Counsel of Record